132

No. (1)

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

PAUL WARNER POWELL,
Petitioner,

v.

LORETTA K. KELLY,
WARDEN, SUSSEX I STATE PRISON,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Whether, after new inculpatory and highly inflammatory evidence came to light, the Supreme Court of Virginia and the United States Court of Appeals for the Fourth Circuit improperly used factual allegations in a bill of particulars to define the scope of jeopardy and avoid the finality of an "acquittal of death" after an initial trial, in violation of the Double Jeopardy Clause and in conflict with decisions of this Court and other state and federal courts?

2. Whether the Fourth Circuit applied the wrong standard under AEDPA and gave undue deference to unsupportable factual determinations of the Supreme Court of Virginia, an issue upon which the circuit courts are divided and upon which this Court has granted a petition for certiorari in *Wood v. Allen*, No. 08-9156, 77 U.S.L.W. 3626, 2009 WL 666588 (U.S. May 18, 2009), by:

a. ruling that trial counsel was not ineffective in failing to review and object at sentencing to admission of an uncertified NCIC report that falsely stated that petitioner had two prior convictions for capital murder; and

b. ruling that petitioner was not tried twice for the same capital murder offense following an earlier acquittal?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES vi

PETITION FOR A WRIT OF CERTIORARI 1

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. *Introduction.* 2

B. *Factual Background.* 4

C. *Virginia's Capital Murder Scheme* 9

D. *Post-Trial Consideration Of Double Jeopardy And Other Claims.* 10

1. Direct Appeal. 10

2. State Habeas. 11

3. Federal Habeas 12

REASONS FOR GRANTING THE WRIT 15

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE COURTS BELOW IMPERMISSIBLY LOOKED TO A BILL OF PARTICULARS TO DEFINE THE SCOPE OF JEOPARDY AND TO AVOID THE FINALITY OF AN ACQUITTAL OF DEATH, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER STATE AND FEDERAL COURTS. 15

A. This Court Has Established In Its Double Jeopardy Jurisprudence That An "Acquittal Of Death," Including By A Reviewing Court Finding Insufficient Evidence Of Prerequisite Death-Qualifying Conditions, Bars The State From Seeking Death A Second Time 16

B. The Bill Of Particulars Could Not Change Or Limit The Finality Of Powell's "Acquittal Of Death" Following His Initial Trial. 23

II. THE COURT ALSO SHOULD GRANT CERTIORARI TO CLARIFY THE PROPER STANDARD OF REVIEW IN A HABEAS PETITION CHALLENGING THE REASONABLENESS OF STATE COURT FACTUAL DETERMINATIONS OR, IN THE ALTERNATIVE, SUMMARILY REVERSE OR HOLD THIS PETITION PENDING THE DISPOSITION IN *WOOD V. ALLEN* 30

CONCLUSION 35

Appendix A
Powell v. Kelly, 562 F.3d 656 (4th Cir. 2009) (*Powell V*) 1a

Appendix B
Powell v. Kelly, 531 F. Supp. 2d 695 (E.D. Va. 2008) (*Powell IV*) 41a

Appendix C
Powell v. Warden of the Sussex I State Prison, 634 S.E.2d 289 (Va. 2006) (*Powell III*) 129a

Appendix D
Powell v. Commonwealth, 590 S.E.2d 537 (Va. 2004) (*Powell II*) 169a

Appendix E
Powell v. Commonwealth, 552 S.E.2d 344 (Va. 2001) (*Powell I*) 227a

Appendix F
Denial of Petition for Rehearing, *Powell v. Kelly*, No. 08-3 (4th Cir. May 12, 2009) 277a

Appendix G
Virginia v. Powell, Indictment For A Felony (Capital Murder) # 51894 (Dec. 3, 2001) 278a

Appendix H
Virginia v. Powell, Commonwealth's Answer to Bill of Particulars, Criminal Nos. 45693-70, 45704, 45705 (Nov. 16, 1999) 280a

Appendix I
Virginia v. Powell, Amended Indictment For A Felony (Capital Murder) # 45693 (May 3, 1999) 282a

Appendix J
Jury Instruction No. 4 ..... 285a

Appendix K
Statutory Provisions Involved 288a

TABLE OF AUTHORITIES

CASES

Albernaz v. United States, 450 U.S. 333 (1981) 24

Arizona v. Rumsey, 467 U.S. 203 (1984) 18

Bailey v. Commonwealth, 529 S.E.2d 570 (Va. 2000) 10

Ben-Yisrayl v. Buss, 540 F.3d 542 (7th Cir. 2008), *cert. denied*, No. 08-8440, 2009 WL 1835192 (U.S. June 29, 2009) 31

Blockburger v. United States, 284 U.S. 299 (1932) 23

Bobby v. Bies, 129 S. Ct. 2145 (2009) 17

Brown v. Ohio, 432 U.S. 161 (1977) 25

Brown v. State, 521 So. 2d 110 (Fla. 1988) 22

Buchanan v. Commonwealth, 384 S.E.2d 757 (Va. 1989) 10

Bullington v. Missouri, 451 U.S. 430 (1981) 17, 18

Burks v. United States, 437 U.S. 1 (1978) 19

Crain v. United States, 162 U.S. 625 (1896), *overruled on other grounds*, *Garland v. Washington*, 232 U.S. 642 (1914) 26

Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989) 21

Grady v. Corbin, 495 U.S. 508 (1990), *overruled, United States v. Dixon*, 509 U.S. 688 (1993) 24

Lambert v. Blackwell, 387 F.3d 210 (3d Cir. 2004) 31

Lenz v. Washington, 444 F.3d 295 (4th Cir. 2006) 32

Mars v. Mounts, 895 F.2d 1348 (11th Cir. 1990) 25

Monge v. California, 524 U.S. 721 (1998) 18

Muhammad v. Commonwealth, 619 S.E.2d 16 (Va. 2005) 10

Payne v. Commonwealth, 509 S.E.2d 293 (Va. 1999) 9

Poland v. Arizona, 476 U.S. 147 (1986) 19, 20, 21

Ring v. Arizona, 536 U.S. 584 (2002) 21

Sanabria v. United States, 437 U.S. 54 (1978) 24, 25, 27

Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) 17

State v. Caudill, 706 P.2d 456 (Idaho 1985) 22

State v. James, 305 So. 2d 514 (La. 1974) 29

State v. Harris, 919 S.W.2d 323 (Tenn. 1996) 22

State v. Hebert, 448 A.2d 322 (Me. 1982) 29

State v. Rust, 528 N.W.2d 320 (Nev. 1995) 22

Taylor v. Maddox, 366 F.3d 992 (9th Cir. 2004) 31

Trussell v. Bowersox, 447 F.3d 588 (8th Cir. 2006) 31

United States v. Dixon, 509 U.S. 688 (1993) 23, 24, 27

United States v. Kamalu, 298 F. App'x 251 (4th Cir. 2008) 26

United States v. Peoples, 360 F.3d 892 (8th Cir. 2004) 22

United States v. Poole, 929 F.2d 1476 (10th Cir. 1991) 30

United States v. Sturdivant, 244 F.3d 71 (2d Cir. 2001) 26, 27

Wood v. Allen, 542 F.3d 1281 (11th Cir. 2008), *cert granted*, 77 U.S.L.W. 3626, 2009 WL 666588 (U.S. May 18, 2009) (No. 08-9156) 30, 31

Wood v. Allen, 77 U.S.L.W. 3626, 2009 WL 666588 (U.S. May 18, 2009) (No. 08-9156) 34

Young v. Kemp, 760 F.2d 1097 (11th Cir. 1985) 22

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const. amend. V 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254 ..... 1, 13, 14, 30, 31, 32, 33

Va. Code Ann. § 18.2-31 ..... 2, 9, 11

Va. Code Ann. § 19.2-264.3 2

PETITION FOR A WRIT OF CERTIORARI

Paul Warner Powell ("Powell") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The April 15, 2009 divided opinion of the court of appeals is reported at 562 F.3d 656 and reprinted in the appendix to this petition ("Pet. App.") at 1a-40a. The district court's January 11, 2009 opinion is reported at 531 F. Supp. 2d 695 and reprinted at Pet. App. 41a-128a.

JURISDICTION

After the court of appeals entered its judgment, a timely petition for rehearing and rehearing en banc was denied on May 12, 2009. Pet. App. 277a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Double Jeopardy Clause of the Fifth Amendment to the Constitution, which states that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb." The case also involves provisions of the Anti-Terrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254, reprinted at Pet. App. 288a-291a. This case also concerns Virginia's capital murder and

related statutes, Va. Code Ann. §§ 18.2-31, 19.2-264.3, reprinted at Pet. App. 292a-295a

STATEMENT OF THE CASE

A. *Introduction*

As Judge Gregory wrote in dissent, it is when the crimes at issue are atrocious that "we must be most vigilant in protecting our long-standing constitutional guarantees." Pet. App. 40a. At an initial trial for the capital murder of Stacie Reed, the Commonwealth of Virginia failed to present sufficient evidence of any death-qualifying condition and Powell therefore was "acquitted of death." The Commonwealth then tried again, and the only issue at that second trial, and now, is whether Powell may be sentenced to death.

There is no dispute that Powell brutally murdered 16-year old Stacie Reed and that he raped and attempted to murder Stacie's 14-year old sister, Kristie Reed. The details of each incident are horrific. In addition and most significant here, after he was acquitted of death following his initial trial (but given three life sentences without parole for related offenses), Powell wrote a mocking, obscenity-laced letter to the prosecutor, providing new evidence and graphic details of his crimes, and a cruel letter to the victims' mother, demonstrating what appeared to be an utter lack of remorse for his crimes.[1]

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[1] Powell's claim that counsel was ineffective by failing to show that the letters were associated with Powell's mental illness, written when he was deprived of medication, was found by the federal

Ultimately, the finality of Powell's acquittal of death withered under the assault of his taunting post-trial letters. The Commonwealth seized upon a supposed "new" theory of capital murder contained in Powell's letter to the prosecutor. It argued that a bill of particulars that had played virtually no role at Powell's initial trial narrowed the jeopardy associated with that trial and created a novel limitation on the significance of Powell's acquittal of death. The trial court agreed and Powell was convicted of capital murder on the "new" theory. Following a sentencing proceeding at which the prosecutor falsely informed the jury that Powell had two previous convictions for capital murder – about which three dissenting justices of the Virginia Supreme Court stated they could not "imagine a more prejudicial error in the admission of sentencing evidence," Pet. App. 163a – Powell was sentenced to death.

Based largely on the admissions in Powell's post-trial letter to the prosecutor, the Virginia Supreme Court ignored established constitutional rules and affirmed, and on habeas review the Fourth Circuit improperly deferred to that decision. The result in this case conflicts with rulings of this Court and other state and federal courts, and sets a dangerous precedent in which prosecutors now may pursue multiple attempts to secure a sentence of death.

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habeas court to be procedurally defaulted. Pet. App. 94a-95a.

B. ***Factual Background***

The evidence at Powell's initial trial, as set forth below, showed that Powell (then aged 20) wanted to date Stacie Reed. Pet. App. 2a. Stacie (at times in the record as "Stacey"), however, was dating someone else. Her boyfriend was African-American, which upset Powell, who had racist views. Pet. App. 2a. On January 29, 1999, Stacie arrived home from school early and found Powell waiting for her. Stacie later was found dead, with her head crushed and her chest repeatedly stabbed, lying on the floor in her sister's bedroom. Some time after Stacie was killed, and while Powell remained in the house, Kristie arrived home from school. After Kristie discovered her dead sister, Powell ordered Kristie into the basement, where he brutally raped and attempted to kill her. Kristie survived, however, and was able to summon help. She identified Powell as her attacker, and he was arrested later that day. Pet. App. 2a-5a.

On May 3, 1999, Powell was indicted and charged with a single count of capital murder and other offenses. As returned by the grand jury, the indictment charged capital murder in that Powell did "kill and murder one Stacey Lynn Reed while in the commission of robbery, while armed with a deadly weapon, in violation of Virginia Code Section 18.2-31." Pet. App. 283a. Before trial, the court allowed the prosecution to amend the indictment. As amended, the indictment charged a single count of capital murder in that Powell did "kill and murder one Stacey Lynn Reed while in the commission of robbery and/or attempted robbery, and/or during the commission of or subsequent to rape and/or

attempted rape and/or forcible sodomy and/or attempted forcible sodomy, in violation of Virginia Code Section 18.2-31." Pet. App. 282a. Powell's counsel moved for a bill of particulars, and the prosecutor responded that "[t]he victim of the rape, attempted rape, forcible sodomy and attempted forcible sodomy is Kristie Reed." Pet. App. 280a. However, this limitation was not contained in the indictment, and the prosecution did not limit its theory of the case at trial to conform to the bill of particulars.

Rather, in the prosecution's opening statement, counsel stated that Powell and Stacie "had a friendship, a social acquaintance. You'll hear evidence that he wanted more from her than that .... And he wanted something from her and she wasn't going to give it to him and for that she lost her life." Pet. App. 31a-32a. During the trial, the Commonwealth put on circumstantial evidence that Powell had attempted to rape Stacie, and it elicited testimony from a police officer that a "physical evidence recovery kit" had been obtained from Stacie and that such kits are "routinely done in cases of sexual assault." Pet. App. 33a.

Powell moved during trial to strike the capital murder charge for insufficiency of the evidence. There was little evidence of robbery and Stacie's killing was not "subsequent to" the rape of Kristie. In response, the prosecutor argued that "we have evidence here . . . that . . . [Powell] was having sex or attempting to have sex with Stacie when the phone rang" and that the circumstances of the killing included "evidence . . . of his intent to rape and have sex and wanting sex." Pet. App. 32a-33a. The

prosecutor never identified Kristie as the victim of the sexual assault alleged as a predicate for the capital murder charge, and the court declined to give Powell's proposed jury instruction identifying Kristie as the victim of the capital murder gradation offense. Pet. App. 33a, 37a-38a. Rather, the court charged the jury that to convict Powell of capital murder it must only find (1) that Powell killed Stacie Reed, (2) that the killing was willful, deliberate and premeditated, and (3) that "*the killing occurred during the commission of robbery and/or attempted robbery and/or during the commission of, or subsequent to rape.*" Pet. App. 285a (emphasis added). During deliberations, the jury sought clarification: "Can a guilty verdict for the rape of Kristie be used to satisfy . . . element 3?" Pet. App. 33a-34a. The judge initially told counsel the answer to this question was "no" (confirming his view that the prosecution was basing its theory of capital murder on a sexual assault of Stacie), Pet. App. 34a n.2, but ultimately responded that the jury could so find.

The jury found Powell guilty of the capital murder of Stacie Reed, the attempted capital murder, abduction, and rape of Kristie Reed, and grand larceny. Powell was acquitted of robbery, attempted robbery, and three firearms offenses. The jury was polled and responded that it did *not* find that the murder of Stacie was committed during the commission of robbery or attempted robbery. Powell's counsel then requested to poll the jury "as to whether they found the rape was committed before, during or after the act of murder," Pet. App. 244a, which would have determined whether the jury

based its verdict on a sexual assault of Stacie or of Kristie. The judge refused that request.[2] The court then conducted a capital sentencing proceeding, and Powell was sentenced to death. For the abduction, attempted murder, and rape of Kristie, Powell received three life sentences without parole.

On appeal, however, the Virginia Supreme Court reversed the capital murder conviction and death sentence, holding that the trial judge erred by allowing the pretrial amendment of the capital murder indictment to include new gradation crimes that were not considered by the grand jury. Pet. App. 257a-258a. The court also ruled:

> [W]e now further determine that there is no basis upon which Powell can be retried for capital murder on remand. The poll of the jury establishes that Powell was acquitted of the charge of capital murder in the commission of robbery or attempted robbery. *It is equally clear that there is simply no evidence upon which the jury could have relied to find that Powell committed or attempted to commit any sexual assault against Stacey before or during her murder*, or that the rape of Kristie did not occur after the murder of her sister. . . .
>
> For these reasons, we will reverse Powell's conviction for capital murder, affirm his convictions for abduction, rape, attempted

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[2] In post-conviction interviews, jurors confirmed that they considered and rejected the theory that Powell raped Stacie. 4th Cir. JA at 391-92.

> capital murder, and grand larceny, and remand the case for a new trial on a charge of *no greater than first degree murder for the killing of Stacey Reed*, if the Commonwealth be so advised.

Pet. App. 276a (emphasis added).

While awaiting retrial and believing he could no longer be tried for capital murder (and already serving three life sentences), Powell sent a mocking, obscenity-laced letter to the prosecutor, "to show you how stupid all y'all . . . are." Pet. App. 9a. The letter disclosed new evidence regarding Stacie's death. Powell indicated he had attempted to initiate consensual sexual intercourse with Stacie, but when she resisted his advances, he attempted to rape her. Pet. App. 9a-10a.

Armed with this evidence, the Commonwealth returned to the grand jury and obtained a new indictment charging Powell with the capital murder of "Stacey Lynn Reed during the commission of or subsequent to the attempted rape of Stacey Lynn Reed." Pet. App. 278a. Powell moved to dismiss the indictment on double jeopardy grounds. The trial court denied the motion and Powell was convicted of capital murder.

In the penalty phase, the prosecutor presented evidence of Powell's criminal history. Instead of introducing certified copies of Powell's convictions as he had done at the first trial, the same prosecutor introduced an uncertified National Crime Information Center ("NCIC") report and falsely claimed it was a "[c]ertified Copy of the Defendant's prior criminal record." Pet. App. 114a. In fact, the NCIC report wildly overstated Powell's criminal

record. Among other errors, the report falsely claimed that Powell had two prior convictions for capital murder and that another charge for capital murder was pending. Pet. App. 111a. Powell's counsel did not review the purported "certified copy" of Powell's record because they "assumed it to be accurate" and raised no objection to its introduction into evidence. 4th Cir. JA at 394. The jury was instructed to consider Powell's criminal history, certified that it did so in its verdict form, and sentenced Powell to death.

C. *Virginia's Capital Murder Scheme*

To understand the double jeopardy issues in the case, it is helpful to review the state law context in which those issues arise. Powell's original amended indictment charged him with "capital murder" "in violation of Virginia Code Section 18.2-31." That section of the Code defines "capital murder" and provides that 15 separate offenses "shall constitute capital murder." Va. Code Ann. § 18.2-31; *Payne v. Commonwealth*, 509 S.E.2d 293, 300-01 (Va. 1999). Each offense is defined to include a premeditated killing of a person in connection with a different gradation element, such as that the killing occurred "in the commission of robbery or attempted robbery," Va. Code Ann. § 18.2-31(4); or "in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration," *id.* § 18.2-31(5). Thus, analogous to the "aggravating factors" defined in the death penalty schemes of other States, establishment of at least one of these capital murder offenses is a necessary

(but not sufficient) condition for imposition of the death penalty in Virginia.

Virginia allows multiple capital offenses to be charged in the "disjunctive" in a single count of an indictment. *Bailey v. Commonwealth,* 529 S.E.2d 570, 584 (Va. 2000); *Muhammad v. Commonwealth*, 619 S.E.2d 16, 40-41 (Va. 2005); *Buchanan v. Commonwealth*, 384 S.E.2d 757, 762 (Va. 1989). That is precisely what was done here: Powell's initial amended indictment charged capital murder "while in the commission of robbery and/or attempted robbery, and/or during the commission of or subsequent to rape and/or attempted rape and/or forcible sodomy and/or attempted forcible sodomy," Pet. App. 282a, and that is how the jury was instructed.

D. *Post-Trial Consideration Of Double Jeopardy And Other Claims.*

1. Direct Appeal.

Following Powell's retrial and conviction, and despite its earlier decision that Powell could *not* be retried for the capital murder of Stacie Reed, the Virginia Supreme Court affirmed Powell's capital murder conviction and death sentence. Pet. App. 201a. The court first held that its prior mandate was simply "based on the record that was before this Court at that time" and did not "expressly preclude the possibility of trying Powell on a new indictment charging capital murder premised on a different gradation offense." Pet. App. 190a. The court then concluded that Powell had not been tried for capital murder in connection with an attempted rape of

Stacie Reed. It recognized that "[i]t is true the bill of particulars is not for the purpose of charging the offense" and that "[t]he indictment must do that," Pet. App. 194a-195a (internal quotation marks omitted), but the court nevertheless concluded that "[t]he bill of particulars in Powell's first trial clearly limited the prosecution of the capital murder of Stacey under Code § 18.2-31(5) to proof of the rape or attempted rape of Kristie." Pet. App. 195a. The court brushed aside the arguments of the prosecution at the initial trial, stating that "[t]he fact remains that Powell was not charged with having attempted to rape Stacey, either as a separate offense or as the gradation offense of the capital murder charge." Pet. App. 195a. The court similarly dismissed statements in its own previous opinion as mere "observations made to clarify that the amended indictment must have been intended to charge Powell with the capital murder of Stacey premised upon the gradation offense of the rape of Kristie, but was insufficient to do so because of a drafting error." Pet. App. 196a.

2. State Habeas.

Powell then filed a petition for habeas corpus in the Virginia Supreme Court, repeating his double jeopardy claim and raising numerous grounds of ineffective assistance of counsel and other claims. The court denied the petition, granted rehearing concerning the ineffectiveness/NCIC report claim, and then again denied the petition in a 4-3 decision. With regard to counsel's failure to challenge the false NCIC report, the majority failed to acknowledge, let alone consider, that there was not just one, but *three*

major errors in the NCIC report (in that it falsely identified two prior capital murder convictions and a third capital murder charge still pending) and ruled that Powell suffered no prejudice. Pet. App. 150a-152a.

For the dissenting justices, Justice Keenan wrote that "I cannot imagine a more prejudicial error in the admission of sentencing evidence." Pet. App. 163a. The dissent emphasized that "the majority's holding . . . suffers from extensive speculation and a failure to address the broad discretion afforded a jury in making a death penalty determination." Pet. App. 164a. It concluded that "the jury's receipt of incorrect information of such magnitude negates any reasonable confidence in the outcome of Powell's sentencing proceeding." Pet. App. 167a-168a.

3. Federal Habeas.

Powell then filed the instant petition for habeas corpus in federal court. The district court dismissed the petition without a hearing. Pet. App. 42a. The court of appeals then granted a COA on three grounds, including the double jeopardy and ineffective assistance/NCIC claims. Judges Shedd and Motz affirmed the dismissal of the petition, with Judge Gregory dissenting.

With regard to Powell's double jeopardy claim, the court first determined that the Virginia General Assembly intended that a defendant may be prosecuted for multiple violations of the Virginia capital murder statute where, as here, there is a single murder victim but different potential gradation crime victims. Thus, the court ruled that

Powell could be prosecuted separately for the capital murder of Stacie in the commission of the attempted rape of Stacie, and for the capital murder of Stacie in the commission of the rape of Kristie. Pet. App. 17a-18a.

Second, the court held that despite the broader language of the indictment, Powell was not placed in jeopardy in the first trial for capital murder in the commission of an attempted rape of Stacie. In so holding, the court relied on the narrower facts set forth in the bill of particulars, even though the indictment had never been amended to conform to those narrower allegations, and even though the jury was never advised of the contents of the bill of particulars. The court held that "[i]t is clear that at the time the jury was sworn in Powell's first trial, Powell was only in jeopardy, so far as is relevant here, for the murder of Stacey during the rape of Kristie as specified by the bill of particulars." Pet. App. 19a-20a n.5.

Finally, the court rejected the argument that the Virginia Supreme Court made an unreasonable determination of the facts in holding that capital murder in the commission of an attempted rape of Stacie was not actually tried in the first trial. Pet. App. 21a-22a.

With regard to the ineffectiveness/NCIC report claim, the court conflated sections (d)(2) and (e)(1) of § 2254. In determining whether the state court's decision was based on an unreasonable determination of the facts "in light of the evidence presented in the State court proceeding" under § 2254(d)(2), the court held that "[w]e must presume the correctness of a state court's factual

determination unless the habeas petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Powell has offered no clear and convincing evidence to rebut the presumption of correctness that we afford the state court's factual findings." Pet. App. 25a.

Judge Gregory dissented. With regard to the Virginia Supreme Court's reliance on the bill of particulars to define the jeopardy to which Powell had been subjected at his initial trial, Judge Gregory concluded: "Even assuming that this holding is not unreasonable as a matter of law, it overlooks the fact that the Commonwealth did *not* actually limit its prosecution for capital murder to the rape of Kristie." Pet. App. 37a (emphasis in original). He concluded: "The Commonwealth did not fail to prosecute Powell for the attempted rape of Stacey, it just failed to do so successfully." Pet. App. 33a n.1. Judge Gregory emphasized: "At every turn, the Commonwealth, the trial court, the jury, and even the Supreme Court of Virginia acted as though Powell were on trial for the murder of Stacey in the commission of any rape or attempted rape, and not specifically on trial for the murder of Stacey in the commission of the rape of Kristie." Pet. App. 36a. This statement is fully consistent with the charge of capital murder as defined in the amended indictment upon which Powell was tried.

Judge Gregory stated that "the bill of particulars operated as a double-edged sword for Powell: on one hand, the Commonwealth ignored its import in putting on circumstantial evidence suggesting that Powell had sexually assaulted Stacey before her murder, while on the other hand the Commonwealth

was able to use the bill of particulars as a safety valve to later retry Powell for capital murder when new evidence came to light." Pet. App. 38a.

Judge Gregory concluded: "In finding that the attempted rape of Stacey had not been litigated in the first trial, the Supreme Court of Virginia made an unreasonable determination of the facts in light of the conduct of all parties involved in that trial. This determination had the unconstitutional effect of permitting the Commonwealth to try Powell a second time in violation of his Fifth Amendment rights." Pet. App. 40a. He observed that given the explicit details revealed by Powell in his letter to the prosecutor, one could understand the strong inclination to prosecute Powell for these heinous crimes. But "[t]he Double Jeopardy Clause makes no distinction between the innocent and the guilty, nor any exception based on the severity of the offense or the personal attributes of the accused." Pet. App. 40a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE COURTS BELOW IMPERMISSIBLY LOOKED TO A BILL OF PARTICULARS TO DEFINE THE SCOPE OF JEOPARDY AND TO AVOID THE FINALITY OF AN ACQUITTAL OF DEATH, IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER STATE AND FEDERAL COURTS.

As Judge Gregory recognized, this case raises important questions concerning the protections of the Double Jeopardy Clause, which safeguard all citizens and are particularly important in death

penalty cases. Following his acquittal of death by the Virginia Supreme Court, Powell consistently has contended that the Double Jeopardy Clause barred his re-prosecution for capital murder. That claim is clearly correct, and Virginia's attempt to rely on the bill of particulars to avoid the finality of Powell's acquittal of death fails under clearly established Supreme Court precedent. Review by this Court is important to resolve the conflict between the decisions below and decisions of this Court and other state and federal courts, and to avoid confusion regarding the ability of prosecutors to pursue multiple attempts to secure a sentence of death.

A. This Court Has Established In Its Double Jeopardy Jurisprudence That An "Acquittal Of Death," Including By A Reviewing Court Finding Insufficient Evidence Of Prerequisite Death-Qualifying Conditions, Bars The State From Seeking Death A Second Time.

There is no doubt that at the conclusion of proceedings following his initial trial, Powell had been acquitted of every basis of capital murder that the Commonwealth had brought against him. At that point, he had been "acquitted of death." And the Virginia Supreme Court explicitly so recognized. It remanded the case "for a new trial on a charge no greater than first degree murder for the killing of Stacey Reed." Pet. App. 276a.

In a line of cases stretching back almost three decades, this Court consistently has held that when "[a] defendant is 'acquitted' of the death penalty" in that the final decision maker "decide[s] that the

prosecution has not proved its case that the death penalty is appropriate," the Double Jeopardy Clause bars re-imposition of death following re-trial. *Sattazahn v. Pennsylvania*, 537 U.S. 101, 117 (2003) (O'Connor, J., concurring) (quotation marks omitted; second bracket in original); *accord Bobby v. Bies*, 129 S. Ct. 2145, 2151-52 (2009).

The roots of the principle were laid in *Bullington v. Missouri*, 451 U.S. 430 (1981). In *Bullington*, the defendant was convicted of capital murder at the guilt phase of his trial, but sentenced to life in prison by the jury. His conviction was then overturned and the case remanded for a new trial. Prior to the second trial, the defendant successfully moved on double jeopardy grounds to preclude the State from again seeking the death penalty, but that decision was reversed by the Missouri Supreme Court.

This Court in turn reversed, holding that the life sentence resulting from Bullington's first trial amounted to an "acquittal" of the death penalty deserving the same "absolute finality" that would be accorded to an acquittal as to guilt. 451 U.S. at 442-43, 446. The Court reasoned that because death could only be imposed where the existence of some aggravating circumstance had been demonstrated beyond a reasonable doubt, the jury's refusal to sentence Bullington to death necessarily implied that the prosecution had not made the requisite showing, and thus was akin to a traditional acquittal. *Id.* at 444-45. The Court held that the State was entitled to no more than "one fair opportunity to offer whatever proof it could assemble" in favor of death, and that it was "the State, not the defendant, that should bear almost the entire risk of error,"

regardless of the nature of the evidence that might subsequently come to light. *Id.* at 446 (internal quotation marks omitted).

Three years later, the Court extended this principle in *Arizona v. Rumsey*, 467 U.S. 203 (1984). In Arizona, the trial judge made the determination whether the State had proved a death-qualifying aggravating factor. In *Rumsey*, the trial judge erroneously determined that an aggravating factor requiring that the murder was committed for the "receipt . . . of pecuniary value" meant that the State had to prove a "murder for hire" (as opposed to a murder in the course of a robbery). Because of this mistake, the judge found no aggravating circumstance to be present and entered a sentence of life imprisonment. The Arizona Supreme Court reversed and held that proof of a contract killing was not required. On remand, the trial court sentenced the defendant to death. This Court reversed, holding that "the double jeopardy principle relevant to [Rumsey's] case is the same as that invoked in *Bullington*: an acquittal on the merits by the sole decision-maker in the proceeding is final and bars retrial on the same charge." *Id.* at 211.

The instant case is just like *Rumsey*. In *Powell I*, the Virginia Supreme Court held that the prosecution had failed to present sufficient evidence to prove *any* of the charged gradation elements necessary to elevate first degree murder to capital murder. Like the trial judge in *Rumsey*, the court concluded that Powell only could be convicted of first degree murder and sentenced to life imprisonment. The fact that this "acquittal" occurred on appeal is irrelevant, as this Court has made clear. *See Monge*

v. California, 524 U.S. 721, 729 (1998) ("where an appeals court overturns a conviction on the ground that the prosecution proffered insufficient evidence . . . that finding is comparable to an acquittal"); *Burks v. United States*, 437 U.S. 1, 16 (1978). The Virginia Supreme Court ruled there had been insufficient evidence to present any death-qualifying gradation element to the jury, meaning that the defendant should have been acquitted of capital murder at trial. Because no death-qualifying theory of capital murder survived the appeal from Powell's initial trial (just as no death-qualifying condition survived Rumsey's trial, however erroneously), Powell – like Rumsey – could not be subjected a second time to a prosecution for death.

That conclusion is explicitly confirmed by this Court's subsequent decision in *Poland v. Arizona*, 476 U.S. 147 (1986). In *Poland*, the defendant was never acquitted of all death-qualifying conditions by any decision-maker or reviewing court. Instead, the trial judge sat as sentencer and considered two aggravating circumstances presented by the State: (1) the murder was committed for the receipt of pecuniary value, and (2) the murder was especially heinous, cruel, or depraved. As in *Rumsey*, the trial judge found the first death-qualifying condition not to be proved because the murder was not for hire, but he found the second "especially heinous, cruel, or depraved" aggravating factor to be present and sentenced the defendants to death. On appeal, the Arizona Supreme Court reversed the underlying convictions and remanded for a new trial. It also ruled that the evidence *had* been sufficient to establish that the murder was committed for the

receipt of pecuniary value, but was *not* sufficient to establish that the murder was especially heinous, cruel, or depraved. Thus, the appellate court ruled that the prosecution *had* proved a death-qualifying condition, although not the same aggravating factor found by the trial court. On remand, the defendants again were convicted and sentenced to death.

This Court affirmed, but expressly distinguished the situation present in *Rumsey* and in the instant case. Quoting *Bullington*, the Court stated that the "clean slate" rule that normally allows a defendant on retrial to be subjected to whatever punishment is lawful is inapplicable in death penalty cases "whenever a jury agrees or an appellate court decides that the prosecution has not proved its case." *Poland*, 476 U.S. at 152 (quoting *Bullington*, 451 U.S. at 443). But that had not occurred in *Poland*: the Court emphasized that the sentencing judge plainly had not acquitted, for he imposed the death penalty, and the appellate court "did not hold that the prosecution had failed to prove its case for the death penalty." 476 U.S. at 154. Critically, this Court held that "because the reviewing court did not find the evidence legally insufficient to justify imposition of the death penalty, there was no death penalty 'acquittal' by that court." *Id.* at 157.

That is *precisely* the situation here, however. Even if one were to accept the bill of particulars theory later adopted by the Virginia Supreme Court and the Fourth Circuit, Powell was charged at his initial trial with two death-qualifying gradation elements: (1) the killing was committed in the commission of robbery or attempted robbery, and (2) the killing was committed in the commission of a

rape of *Kristie*. But under *both* of those death-qualifying theories, the reviewing court found there was insufficient evidence to permit imposition of the death penalty, and therefore there *was* a death penalty "acquittal" by that court. Indeed, the Virginia Supreme Court expressly recognized that fact in its opinion and held that Powell could not be retried for capital murder. The Double Jeopardy Clause therefore prohibited the Commonwealth from seeking death again on retrial. A contrary ruling would convert the adjudication of death into "a set of minitrials on the existence of each aggravating circumstance," which the Court refused to do in *Poland*. 476 U.S. at 156. Rather, the Court has held that the issue is whether there was an acquittal of death for insufficiency of evidence on *all* aggravating factors presented (as in *Rumsey)* or not (as in *Poland)*.

Finally, the fact that Virginia has incorporated many of its death-qualifying conditions into elements of the capital murder offense cannot undermine the constitutional principles set forth in *Bullington* and *Rumsey*. *See Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) (holding that "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor'" in a death case should not be constitutionally determinative); *Delap v. Dugger*, 890 F.2d 285, 314-16 (11th Cir. 1989). As the Court stated in *Bullington*, the State should have no more than "one fair opportunity to offer whatever proof it could assemble" in favor of death, regardless of the nature of the evidence that might subsequently come to light. 451 U.S. at 446 (quotation marks omitted).

Contrary to the decisions below, many courts have held that the State's failure to present adequate evidence to secure death at an initial trial forecloses a subsequent attempt to secure death using a different factual theory, even where the initial acquittal of death later proved erroneous. *See, e.g., Young v. Kemp*, 760 F.2d 1097, 1106-07 & n.12 (11th Cir. 1985) (prior "acquittal of death" by habeas court foreclosed subsequent application of death penalty, even if the State could prove a new aggravating factor); *United States v. Peoples*, 360 F.3d 892, 895 (8th Cir. 2004) ("The touchstone principle in capital sentencing proceedings is that jeopardy terminates and provides finality for the penalty phase" if the decision-maker "finds that the prosecutor failed to prove the aggravating circumstances"); *State v. Caudill*, 706 P.2d 456, 463 (Idaho 1985); *Brown v. State*, 521 So. 2d 110, 112 (Fla. 1988); *State v. Rust*, 528 N.W.2d 320, 327-28 (Neb. 1995). *But see State v. Harris*, 919 S.W.2d 323, 331 (Tenn. 1996) (where prosecution originally charged "wrong" aggravating circumstance, failure to establish basis for death was "legal" in nature and second attempt to impose death not foreclosed).

Therefore, as Powell consistently has contended, the Double Jeopardy Clause prohibited the Commonwealth from seeking a death sentence after the Virginia Supreme Court ruled that the prosecution had failed to present sufficient evidence to prove *any* death-qualifying condition at Powell's initial trial.

B. The Bill Of Particulars Could Not Change Or Limit The Finality Of Powell's "Acquittal Of Death" Following His Initial Trial.

Once Powell was acquitted of death, he could not be prosecuted for capital murder. That conclusion follows whether a new theory of capital murder later developed, or whether the prosecution had withheld a separate theory of capital murder in reserve in the event of an acquittal. In the death penalty context, an "acquittal of death" is final regardless of the evidence that was presented or that could have been presented to secure death. By looking to the *factual* allegations set forth in the bill of particulars and to the *evidence* and contentions at Powell's initial trial, rather than to the *charge* at issue – here a charge of capital murder based on the killing of Stacie Reed – the courts below deviated from the established double jeopardy jurisprudence of this Court, as consistently followed by other state and federal courts.

In several different contexts, this Court has made clear that the proper application of the Double Jeopardy Clause is defined by the *charge* at issue, and not by the *facts* as alleged or proved at trial. In cases involving two different offenses, the Court has held that the relevant inquiry is set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932): whether each offense contains an element the other does not. The test thus focuses on the nature of the *charges* at issue, and not on the underlying facts. In *United States v. Dixon*, 509 U.S. 688 (1993), the Court employed this "same elements" test in cases of successive prosecutions, overruling its

decision three years earlier in *Grady v. Corbin*, 495 U.S. 508 (1990). In *Grady*, the Court had held that "if, to establish an essential element of an offense charged in [a successive] prosecution, the government will prove *conduct* that constitutes an offense for which the defendant has already been prosecuted," *id.* at 510 (emphasis added), the successive prosecution may not be had. The *Grady* test was a fact-intensive inquiry, and in *Dixon* this Court held that the test's focus on underlying *facts* rather than on the elements of the *offense* "lacks constitutional roots." 509 U.S. at 704.

Thus, following *Dixon*, whether the defendant may be subjected either to multiple punishments or to successive prosecutions for two different offenses "focuses on the statutory elements of the two crimes with which a defendant has been charged, not on the proof that is offered or relied upon to secure a conviction." *Grady*, 495 U.S. at 528 (Scalia, J., dissenting); *see also Dixon*, 509 U.S. at 716-17 (Rehnquist, C.J., concurring in part and dissenting in part) ("[o]ur double jeopardy cases applying *Blockburger* have focused on the statutory elements of the offenses charged, not on the facts that must be proved under the particular indictment at issue"); *Albernaz v. United States*, 450 U.S. 333, 338 (1981). Whether two charged offenses involve the same (or different) factual allegations or proof is irrelevant.

The Court has employed a similar focus on the nature of the *charge* at issue in another context. In *Sanabria v. United States*, 437 U.S. 54 (1978), the Court considered whether an acquittal of an offense based on one set of facts foreclosed a successive prosecution of the same offense based on a different

set of facts from the same criminal episode. Once again, the Court held that whether the Double Jeopardy Clause barred the second prosecution turned not on whether the *factual* allegations and proof in the two cases were different, but whether the offense at issue was defined to permit more than one "allowable unit of prosecution." *Id.* at 70. Because the different facts in *Sanabria* involved the same "allowable unit of prosecution," the successive prosecutions were prohibited. Stated another way, the protections of the Double Jeopardy Clause cannot be avoided "by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown v. Ohio*, 432 U.S. 161, 169 (1977).

Applying this principle, the Court of Appeals in *Mars v. Mounts*, 895 F.2d 1348 (11th Cir. 1990), correctly held that the factual allegations in a bill of particulars could not serve to limit the jeopardy to which the defendant was subjected at an initial trial. In that case, the bill of particulars specified a particular date on which a murder occurred; the jury found that the murder had *not* occurred on that date and acquitted on that basis. The prosecution then brought a new indictment, alleging the correct date of the murder. However, because the murder involved only a single unit of prosecution, the successive prosecution was barred by double jeopardy. The court rejected the argument that the bill of particulars served to define the offense at issue in the first trial, stating that a bill of particulars "is designed as a shield for defendants to protect themselves against surprise at trial by granting them limited discovery of the state's proof"

and "is not designed for the state's use as a sword." *Id.* at 1358.

Most relevant here, there is yet a third context in which the Court has looked to the nature of the *charge* on which the defendant initially was tried to define the scope of jeopardy, and not to the factual allegations or proof at trial. A single count of an indictment may at times charge two or more distinct offenses. Although such a charge is "duplicitous," a dismissal of such a charge is not always required. *See, e.g., United States v. Sturdivant*, 244 F.3d 71, 76 (2d Cir. 2001) ("acts that could be charged as separate counts of an indictment may instead be charged in a single count if those acts could be characterized as part of a single continuing scheme") (quotation marks omitted); *United States v. Kamalu*, 298 F. App'x 251, 254 (4th Cir. 2008) (same).

This Court addressed the double jeopardy implications of such a charge in *Crain v. United States*, 162 U.S. 625 (1896), *overruled on other grounds*, *Garland v. Washington*, 232 U.S. 642 (1914). In *Crain*, a single count of the indictment charged "three separate, distinct felonies," but the Court found the objection to the charge "upon the ground of duplicity was properly overruled." 162 U.S. at 634, 636. Significantly, the nature of the charge as defined in the indictment also established the scope of jeopardy:

> We perceive no sound reason why the doing of the prohibited thing, in each and all of the prohibited modes may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive

> crime under the statute. And this is a view altogether favorable to an accused, who pleads not guilty to the charge contained in a single count, *for a judgment on a general verdict of guilty upon that count will be a bar to any further prosecution in respect of any of the matters embraced by it.*

Id. at 636 (emphasis added); *see also Dixon*, 509 U.S. at 717 (Rehnquist, C.J., concurring in part and dissenting in part) (explaining *Harris v. Oklahoma*, 433 U.S. 682 (1977), as holding that a charge of felony murder incorporates "the statutory elements of the various felonies upon which a felony-murder conviction could rest"); *Sturdivant*, 244 F.3d at 77-78 ("We hold, however, that the government would be estopped from asserting, for double jeopardy purposes, that the jury's general verdict was not a final resolution of both crimes charged in Count II. Principles of equity prohibit the government from benefiting from the prejudicial ambiguity that the government alone was responsible for creating.").

The Court's consistent focus on the nature of the offense as charged in the indictment serves to allow jeopardy to be readily and precisely defined, which indeed is one of the central purposes of the charging document. *Sanabria*, 437 U.S. at 65-66 ("The precise manner in which an indictment is drawn cannot be ignored, because an important function of the indictment is to ensure that, in case any other proceedings are taken against [the defendant] for a similar offense, . . . the record [will] sho[w] with accuracy to what extent he may plead a former acquittal or conviction") (internal quotation marks omitted; alterations in original).

The approach of the courts below to avoid the finality of Powell's "acquittal of death" of capital murder by looking to factual allegations in the bill of particulars and to the evidence and contentions at Powell's initial trial is wholly at odds with these principles. Powell was charged with capital murder, in an indictment (as amended) that alleged multiple theories of Virginia's capital murder statute. But he was acquitted of that offense when the Virginia Supreme Court found the evidence insufficient to sustain *any* of the alleged qualifying conditions for death. Thus, regardless of the factual allegations and evidence presented at trial, or the factual allegations or evidence that *could* have been presented, Powell was acquitted of capital murder and could not be prosecuted again for that offense. And as with any other acquittal of a charged offense, that conclusion follows whether new evidence and a new theory of prosecution later comes to light, or whether a separate theory was available at the time of trial and held in reserve.

The error of the courts below is particularly egregious given the nature of the amended indictment on which Powell was tried. Thus, *even if* the capital murder of one individual can be charged in Virginia as multiple, separate offenses, and *even if* an acquittal of one would not bar a subsequent prosecution of another, here Powell's initial amended indictment at his first trial was *not* limited to specific identified theories of capital murder. As alleged in the indictment, Powell was charged with the capital murder of Stacie Reed in the commission of *any* robbery and/or *any* rape. The courts below erred by looking to a bill of particulars, and ultimately to the

entire record of the initial trial, to define the jeopardy to which Powell had been subjected.

Although the double jeopardy principles at issue are clear, review by this Court nevertheless is important. Most courts have followed this Court's precedents and have adopted an approach wholly at odds with that of the Supreme Court of Virginia and the Fourth Circuit here. For example, in *State v. Hebert*, 448 A.2d 322, 326 (Me. 1982), the Maine Supreme Court held:

> [W]hen a defendant is placed in jeopardy under a valid indictment, he or she may not thereafter be placed in jeopardy for *any offense* of which he properly could have been convicted under that indictment. The scope of jeopardy created by an indictment is therefore as broad as that indictment may be fairly read. The ambit of the constitutional bar to subsequent prosecution is co-extensive with the scope of jeopardy created in the prior prosecution. Thus, if the allegations in one prosecution describe an offense which is shown to be within the scope of the charging allegations of a prior prosecution, then the defendant may successfully raise a defense of former jeopardy to the subsequent proceedings.

See also, e.g., *State v. James*, 305 So. 2d 514, 519 (La. 1974) (holding that "the doctrine that the broad construction of indictments in favor of their validity, at least in the absence of true lack of notice, correlatively insures also that the conviction or acquittal upon such an indictment bars further prosecution for any and all crimes included within

such broad construction"). But some other courts, like those below here, have defined jeopardy by reference to factual allegations or proof. *See, e.g.*, *United States v. Poole*, 929 F.2d 1476, 1479 (10th Cir. 1991) (holding that courts should examine the "entire record and not just the indictment" alone "to avoid being twice placed in jeopardy for the same offense").

This Court should grant review to consider the important double jeopardy issue in this case.

II. THE COURT ALSO SHOULD GRANT CERTIORARI TO CLARIFY THE PROPER STANDARD OF REVIEW IN A HABEAS PETITION CHALLENGING THE REASONABLENESS OF STATE COURT FACTUAL DETERMINATIONS OR, IN THE ALTERNATIVE, SUMMARILY REVERSE OR HOLD THIS PETITION PENDING THE DISPOSITION IN *WOOD V. ALLEN*.

This Court recently granted certiorari in *Wood v. Allen*, No. 08-9156, to address the application of two provisions of AEDPA to habeas claims alleging that the state court's decision was based on an unreasonable determination of the facts in light of the evidence presented in state court proceedings. *Wood v. Allen*, 542 F.3d 1281 (11th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3626, 2009 WL 666588 (U.S. May 18, 2009) (No. 08-9156). The Fourth Circuit's decision in this case raises the same issue, namely, whether the court erred by applying the clear and convincing evidence standard of 28 U.S.C. § 2254(e)(1) to Powell's habeas claims that were based entirely on the state court record.

Sections 2254(d)(2) and 2254(e)(1) both reference review of state court factual determinations. Under § 2254(d)(2), a state court adjudication of a claim does not foreclose federal habeas relief where the state court decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Separately, § 2254(e)(1) provides that "a determination of a factual issue made by a State court shall be presumed to be correct" and that the "applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

There is a conflict among the circuit courts regarding the proper application of the two provisions. The Third and Ninth Circuits have held that only § 2254(d)(2) applies when a claim is based entirely on the state court record, and that only § 2254(e)(1) applies when a claim is based, in whole or in part, on evidence introduced during the federal habeas proceedings that was *not* part of the state court record. *See Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004); *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir. 2004). Other circuits have interpreted § 2254(e)(1) to apply to any federal habeas review of a state court's factual determination, and they apply both § 2254(d)(2) and § 2254(e)(1) to all claims. *See Wood*, 542 F.3d at 1304 n.23; *Ben-Yisrayl v. Buss*, 540 F.3d 542, 549 (7th Cir. 2008), *cert. denied*, No. 08-8440, 2009 WL 1835192 (U.S. June 29, 2009); *Trussell v. Bowersox*, 447 F.3d 588, 591 (8th Cir. 2006).

Like the Eleventh Circuit in *Wood*, the Fourth Circuit applies § 2254(e)(1) to all state court factual

determinations. *See Lenz v. Washington*, 444 F.3d 295, 300-01 (4th Cir. 2006) (considering and rejecting the argument that § 2254(e)(1)'s restrictions are inapplicable to claims based entirely on the state court record). In the instant case, Powell asserted multiple claims based entirely on the state court record and argued that the Virginia Supreme Court's decisions in *Powell II* and *Powell III* were based upon unreasonable determinations of the facts. In rejecting those claims, the Fourth Circuit improperly applied section (e)(1) and unreasonably deferred to the factual determinations of the Virginia Supreme Court.

With regard to the ineffectiveness/NCIC report claim, the court clearly conflated the (d)(2) and (e)(1) standards, consistent with its prior decision in *Lenz* and with the Eleventh Circuit's decision in *Wood*, but contrary to the decisions of the Third and Ninth Circuits in *Lambert* and *Taylor*. Thus, the Fourth Circuit rejected the NCIC claim because "[w]e must presume the correctness of a state court's factual determination unless the habeas petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Powell has offered no clear and convincing evidence to rebut the presumption of correctness that we afford the state court's factual findings." Pet. App. 25a.

Because Powell's ineffectiveness/NCIC report claim was based entirely on the state court record, the Fourth Circuit should not have applied the clear and convincing evidence standard of section (e)(1) to reject the claim. Rather, the court should have looked to "the evidence presented in the State court proceeding" to determine whether the state court's

decision "was based on an unreasonable determination of the facts." 28 U.S.C. § 2254(d)(2). Applying that standard, the Virginia Supreme Court's factual determination of the NCIC report claim clearly was unreasonable (a) because it failed to consider or even acknowledge that there were three separate major errors in the NCIC report, and (b) for the additional reasons summarized in the dissenting opinion of three members of the state court. *See* Pet. App. 163a-168a.

The Fourth Circuit similarly and erroneously deferred to the factual determination of the Virginia Supreme Court that a charge of capital murder in the commission of an attempted rape of Stacie was not, in fact, litigated in Powell's first trial. Pet. App. 19a-22a. Judge Gregory's dissent aptly illustrates the significance of a proper review of the full state court record, as opposed to the cursory and overly-deferential review accorded by the majority. Indeed, this issue is a candidate for summary reversal.

Thus, *even if* the scope of jeopardy at Powell's initial trial *could* have been limited by the factual allegations in the bill of particulars, it is clear, as Judge Gregory explains, that here it was not. The prosecution never limited its theory of the case at trial to *Kristie* being the victim of the capital murder gradation element, and it offered evidence suggesting that *Stacie* had been sexually assaulted. Pet. App. 32a-33a. Most tellingly, the defense requested an instruction that *Kristie* was the rape victim for the capital murder gradation element, and the trial court declined to give it. Pet. App. 38a. It was clear that Kristie had been raped, but equally clear that her assault had not occurred until after Stacie was

killed. By resisting any reference at trial to the limitation in the bill of particulars, the prosecution held open the possibility that Powell would be convicted of capital murder without having to force the jury to choose between a sexual assault of Stacie (for which there was only circumstantial evidence) or a sexual assault of Kristie (which occurred after Stacie's death and could not sustain a conviction for capital murder). Because the prosecution consciously chose to keep Powell in jeopardy of an undefined sexual assault, it does not matter what the Commonwealth asserted in a bill of particulars that was never disclosed to the jury or used as the basis to instruct it. For this additional reason, the Court should grant the petition and consider a summary reversal.

As Judge Gregory concluded, the Virginia Supreme Court's determination that Powell was not placed in jeopardy of the capital murder of Stacie in the commission of an attempted rape of Stacie during the first trial is an unreasonable determination of the facts in light of the record of the state proceedings. While there was insufficient evidence in the first trial to *convict* Powell of that offense, the issue was placed squarely before the jury and the second trial thus amounted to a violation of the Fifth Amendment's protections against double jeopardy. Consequently, at a minimum, this Court either should grant certiorari on this question or hold the petition pending the Court's disposition in *Wood v. Allen*, No. 08-9156.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

United States Court of Appeals,
Fourth Circuit.
Paul Warner POWELL, Petitioner-Appellant,
v.
Loretta K. KELLY, Warden, Sussex I State Prison,
Respondent-Appellee.
No. 08-3.

Argued Dec. 3, 2008.
Decided April 15, 2009.

OPINION

SHEDD, Circuit Judge:

Paul Warner Powell, a Virginia capital inmate, appeals the denial of his petition for a writ of habeas corpus. We granted a certificate of appealability ("COA") on three issues: (1) whether the imposition of a death sentence is precluded by the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution; (2) whether trial counsel rendered ineffective assistance by failing to object to the admission of an inaccurate National Crime Information Center report; and (3) whether trial counsel rendered ineffective assistance by failing to develop and present available mitigating evidence. For the following reasons, we affirm.

I.

A.

We begin with a summary of the facts pertaining to the underlying crimes, as articulated by the Supreme Court of Virginia in Powell's first direct appeal:

"Powell was acquainted with Stacey Lynn Reed ("Stacey") for two and a half years prior to the commission of the crimes in question. Kristie Erin Reed ("Kristie"), Stacey's younger sister, described her sister and Powell as '[f]riends.' Powell, who was 20 years old at the time of the murder, had wanted to date Stacey, who was 16 years old, but recognized that she was underage and he 'could go to jail for that.'"

"Powell, a self-avowed 'racist and white supremacist,' was aware that Stacey, who was white, was dating Sean Wilkerson, who is black. Wilkerson had recently moved to another locality, but he and Stacey remained in contact. Stacey was a member of her high sch~~l's Junior Reserve Officer's Training Corps and planned to attend a military ball with Wilkerson.

"Just before noon on January 29, 1999, Stacey arrived home from school early, having completed her examinations that were being given that day. Powell was waiting for her at her home when she arrived. When Powell learned that Robert Culver, a friend of the girls' mother, would be home shortly for lunch, Powell left and returned at about 12:45 p.m.,

after Culver had left. When Powell returned, he was armed with a 'survival' knife, a 'butterfly' knife, a box cutter, and a 9-millimeter pistol.

"Stacey was talking to Wilkerson on the telephone. After Stacey ended the telephone conversation, Powell confronted her about her relationship with Wilkerson. He demanded that Stacey end her relationship with Wilkerson. According to Powell, he and Stacey argued, and the argument grew into a struggle. Powell drew the survival knife from his belt and Stacey 'got stuck.' Powell denied stabbing Stacey deliberately. The struggle continued briefly until Stacey collapsed on the floor in her sister's bedroom.

"Although Powell did not know whether Stacey was still alive, he made no effort to determine her condition or call for medical assistance. Powell 'wandered around the house, got some iced tea, had a cigarette.' Kristie arrived home from school shortly after 3 p.m. and was met at the door of the home by Powell. Powell told her that Stacey was in her room, but moments later Kristie discovered her sister's body in Kristie's bedroom. She dropped her schoolbooks and began to cry.

"Powell ordered Kristie to go to the basement. Kristie, who knew that Powell was usually armed, complied because she 'didn't want to die.' In the basement, Powell ordered Kristie to remove her clothes and to lie on the floor. Powell then raped Kristie, and she 'begg[ed] him not to kill her.' Powell later admitted that he knew that Kristie, who was 14

years old at the time of the rape, had been a virgin."

"While Powell and Kristie were in the basement, Mark Lewis, a friend of Kristie, came to the house and knocked on the door. When Powell heard the knock, he tied Kristie's legs together and tied her hands behind her back with shoelaces he cut from her athletic shoes. Powell then dressed and went upstairs.

"While Powell was upstairs, Kristie managed to loosen the bonds on her hands and attempted to 'scoot across the floor to hide' under the basement steps. Hearing Powell coming back to the basement, she returned to the position on the floor where he had left her. Powell then strangled Kristie with a shoelace and she lost consciousness. While she was unconscious, Powell stabbed Kristie in the abdomen and slit her wrists and throat."

"Powell returned upstairs, searching for 'anything worth taking.' He fixed another glass of iced tea, which he took with him when he left the home a short time later. Powell went to a friend's house and then drove with the friend to the District of Columbia to buy crack cocaine.

"Kristie regained consciousness sometime after Powell had left her home. About 4:10 p.m., she heard Culver return home, and she called out his name. Culver discovered Kristie in the basement, called the 911 emergency response telephone number, and began rendering first aid to her. He later discovered

Stacey's body upstairs. Shortly thereafter, paramedics arrived. In response to a question from one of them, Kristie identified Powell as her attacker. Powell was arrested later that day at the home of his friend's girlfriend, where he and the friend had gone after buying drugs.

"Kristie was transported by helicopter to Inova Fairfax Hospital where she received treatment for her injuries. It was ultimately determined that the wounds to her throat and abdomen each came within one centimeter of severing a major artery which likely would have caused her death.

"An autopsy revealed that Stacey had died from a knife wound to the heart. The medical examiner testified that there was a single entrance wound and two exit wounds indicating that the knife had been withdrawn, at least partially, and then reinserted into the heart. One wound path pierced the left ventricle and the other went through both the left and right ventricles, exiting the heart at the back of the right ventricle.

"Stacey's body also exhibited a number of bruises on the head, chest, abdomen, back, arms, and legs, abrasions on the face, a stab wound to the back, and a cut and scrapes on the left forearm. The autopsy further revealed that Stacey had been struck on the head with sufficient force to cause bleeding inside her scalp and in the membranes surrounding her brain prior to death. These injuries were not consistent with Stacey merely having fallen during a

struggle.

"The DNA profile obtained from the blood found on Powell's survival knife was consistent with the DNA profile of Stacey's blood. The DNA profile obtained from sperm fractions from swabs taken from Kristie's vagina and perianal area was the same profile as that obtained from Powell's drawn blood sample.

"While in jail, Powell wrote letters to friends in which he admitted having committed the murder, rape, and attempted murder because of Stacey's relationship with a black man. He further claimed that he had planned to kill Stacey's family and steal the family's truck. Powell also wrote to a female friend and asked her to 'get one of [her] guy friends ... to go to a pay phone and call Kristie and tell her [that] she better tell the cops she lied to them and tell her [that] she better not testify against me or she's gonna die.'

"Powell told another inmate that he had become angry with Stacey when she refused to have sex with him after talking to Wilkerson. Powell told the inmate that he stabbed Stacey twice and that when he attempted to cut Kristie's throat, his knife was too dull, '[s]o he started stepping on her throat trying to stomp her throat.' To another inmate, Powell described Stacey's killing as a 'human sacrifice' and expressed satisfaction in having raped a virgin." *Powell v. Commonwealth,* 261 Va. 512, 552 S.E.2d 344, 347-348 (2001) ("*Powell I*").

B.

In the original indictment, Powell was charged with a single count of capital murder in which the gradation crime was the commission, or attempted commission, of robbery.[1] In 2000, Powell was convicted of the capital murder of Stacey and sentenced to death. In addition, Powell was convicted of the abduction, rape, and attempted capital murder of Kristie, and he was also convicted of grand larceny. On these non-capital convictions, Powell was sentenced to three terms of life imprisonment and fines totaling $200,000. Powell was acquitted of robbery, attempted robbery, and three firearm charges.

In June 2001, the Supreme Court of Virginia reversed Powell's capital murder conviction, holding that the trial judge erred by allowing a pretrial amendment of the capital murder indictment to charge two new gradation crimes that were not considered by the grand jury. *See Powell I,* 552 S.E.2d at 355-56. The additional gradation crimes were the commission, or attempted commission, of rape and the commission, or attempted commission, of sodomy. The court held that including these additional counts of capital murder expanded the nature and character of the charges against Powell

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[1] Virginia's capital murder statute includes fifteen gradation offenses, which when accompanied with the "willful, deliberate, and premeditated killing" of a person, make the defendant eligible for the death penalty. *See* Va. Code § 18.2-31.

in a manner not allowed by Va. Code § 19.2-231. *Id.* at 357.[2]

Based on the circumstances then existing, the state supreme court also concluded that there was no basis to try Powell for capital murder on remand. *Id.* at 363. In making this determination, the court noted that Powell had been acquitted of robbery or attempted robbery, thereby eliminating these offenses from being gradation offenses for the capital murder charge. Further, the court held that "the evidence was insufficient to support [Powell's] conviction for the capital murder of Stacey 'during the commission of or subsequent to' the rape of Kristie" because the evidence clearly showed the rape of Kristie occurred *after* the murder of Stacey. *Id.* at 361. Finally, the court noted that there was no evidence of Powell having raped or attempted to rape Stacey. *Id.* at 363.

C.

While awaiting retrial and believing that he could no longer be tried for capital murder, Powell wrote the Commonwealth's Attorney and disclosed new evidence regarding the circumstances surrounding Stacey's death. In Powell's second direct appeal, the

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[2] Va. Code § 19.2-231 allows the government to amend an indictment to correct a defect in the form of the indictment or a variance between the allegations and the evidence offered in proof thereof, so long as the amendment does not change the nature or character of the offense charged.

Supreme Court of Virginia summarized the events as follows:[3]

"On October 21, 2001, Powell wrote an obscenity-laced letter to the Commonwealth's Attorney who had prosecuted Powell in his first trial. Powell stated in the letter that, because he believed he could not be retried for capital murder, 'I figured I would tell you the rest of what happened on Jan. 29, 1999, to show you how stupid all y'all ... are.' Admitting that he 'planned to kill the whole family' on that day, Powell further stated that 'I had other plans for [Stacey] before she died.' Powell described how he had attempted to initiate consensual sexual intercourse with Stacey, which he had previously admitted. Powell then revealed that when Stacey resisted his advances, he pushed her onto her bed and, while sitting on top of her, told Stacey 'that we could do it the easy way or the hard way.'

"Powell then described how Stacey had 'started fighting with me and clawed me [sic] face.' Powell stated that he 'slammed her to the floor ... sat on top of her and pinned her hands down again.' Powell claimed that Stacey relented 'and I told her if she tried fighting with me again I would kill her.'

"Continuing, Powell stated that, at his direction, Stacey began to disrobe, but stopped when the

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[3] For purposes of clarity, we have omitted any footnotes within this summary that are irrelevant to the disposition of the issues before us.

telephone rang. Stacey put her clothes back on so that she could answer the telephone. Powell refused to allow Stacey to answer the telephone and ordered her to resume disrobing. When she refused, Powell 'pushed her back and pulled out [his] knife.' When Stacey attempted to leave the bedroom, Powell stabbed her. Stacey fell back and Powell removed the knife. Stacey then stumbled to another bedroom and collapsed. Powell 'saw that she was still breathing' and 'started stomping on her throat' until he 'didn't see her breathing anymore.'

"Armed with this new evidence, the Commonwealth elected to *nolle prosequi* the indictment in the remanded case, under which it was limited to trying Powell for first degree murder under our mandate, and sought a new indictment against Powell for capital murder. On December 3, 2001, the grand jury returned an indictment charging Powell with the capital murder of 'Stacey Lynn Reed during the commission of or subsequent to the attempted rape of Stacey Lynn Reed.'

"On April 24, 2002, Powell filed a motion to dismiss the December 3, 2001 indictment. Powell asserted that' [w]hen the Supreme Court of Virginia issues an opinion concerning a case, this opinion becomes the law of the case' and, thus, the directive of the opinion and mandate from this Court in his first appeal limited his retrial to a charge no greater than first degree murder, regardless whether that trial was conducted under the original indictment or a new indictment. The Commonwealth filed a response to

this motion, asserting that the judgment of this Court in Powell's first appeal was not applicable to the December 3, 2001 indictment because Powell had 'never [previously] been charged with the capital murder of Stacey Reed in the commission or attempted commission [of] sexual assault against [Stacey Reed] because, at the time of [Powell's first] trial, no such evidence existed.' Accordingly, the Commonwealth contended that the December 3, 2001 indictment was 'a new charge, one that has never been litigated in trial nor considered by the Virginia Supreme Court. Following a hearing on this and other pre-trial matters, the trial court overruled Powell's motion to dismiss the indictment in an order dated May 6, 2002.

"On May 17, 2002, Powell filed a second motion to dismiss the December 3, 2001 indictment.... The import of Powell's argument was that his prior trial and the reversal of his conviction by [the Supreme Court of Virginia] acted as an 'implied' or 'judicial' acquittal of the attempted rape of Stacey, thus barring his retrial for her capital murder premised on that gradation offense. The Commonwealth responded that the issue whether Stacey had been the victim of a sexual assault was not before the jury in his first trial because the bill of particulars provided at Powell's request indicated that only Kristie was the victim of the sexual assault gradation offenses charged in the amended indictment. Similarly, the Commonwealth contended that our comments concerning the insufficiency of the evidence to prove a sexual assault or attempted

sexual assault against Stacey were not directed toward any finding of the jury, but to the contrary were indicative of the fact that the jury did not consider whether Stacey had been the victim of such an assault or attempt.

"On June 5, 2002, the trial court held a hearing on Powell's second motion to dismiss the indictment. After hearing argument, the trial court stated that by identifying Kristie as the victim of the rape or attempted rape in the bill of particulars, the Commonwealth had clearly identified her as the victim of those gradation crimes in the amended indictment for capital murder. The trial court also agreed with the Commonwealth that this Court's reference to the lack of evidence to prove any sexual assault or attempted sexual assault against Stacey was merely a comment on the record, and not an assertion that this was a theory of the case presented by the Commonwealth in Powell's first trial. On July 3, 2002, the trial court entered an order overruling Powell's second motion to dismiss the indictment." *Powell v. Commonwealth,* 267 Va. 107, 590 S.E.2d 537, 544-545 (2004) ("*Powell II*").

D.

In January 2003, Powell was convicted of the capital murder of Stacey during the commission of rape or attempted rape of Stacey and sentenced to death. Powell appealed his conviction claiming, *inter alia,* that the second indictment should have been dismissed on various grounds, including the Double

Jeopardy Clause. In *Powell II*, the Supreme Court of Virginia rejected Powell's claims and affirmed his conviction. Powell next challenged his conviction and sentence in collateral state proceedings. *See Powell v. Warden of Sussex I State Prison,* No. 042716, 2005 WL 2980756 (Va. 2005) ("*Powell III*"). Powell raised numerous claims that the state supreme court found were procedurally defaulted, including an allegation that the Commonwealth violated his right against double jeopardy by trying him twice for the same offense. Among the new claims Powell asserted was an objection to the admission of a National Crime Information Center report ("NCIC report") containing inaccurate information about Powell's criminal history during sentencing and a claim that his trial counsel provided him ineffective assistance by failing to investigate and present compelling mitigating evidence. The Supreme Court of Virginia denied relief on all grounds. Subsequently, the state supreme court granted rehearing on the question of whether counsel was ineffective in the sentencing phase for failing to object to the NCIC report. *See Powell v. Warden of Sussex I State Prison,* 272 Va. 217, 634 S.E.2d 289 (2006) ("*Powell IV*"). Ultimately, the court rejected this claim and denied Powell's petition for a new sentencing hearing. *Id.*

Thereafter, Powell filed a petition for a writ of habeas corpus in federal district court. *See* 28 U.S.C.A. § 2254. Powell asserted nine claims for relief. *See Powell v. Kelly,* 531 F. Supp. 2d 695, 705 (E.D. Va. 2008) ("*Powell V*"). On the Commonwealth's motion, the district court dismissed

Powell's petition. As noted, we granted a COA on three issues: (1) whether the imposition of a death sentence is precluded by the Double Jeopardy Clause; (2) whether trial counsel was constitutionally ineffective in failing to object to the admission of an inaccurate NCIC report; and (3) whether trial counsel was constitutionally ineffective in failing to develop and present available mitigating evidence. We address each in turn.

II.

A.

We review the district court's dismissal of Powell's petition *de novo*. *See Tucker v. Ozmint*, 350 F.3d 433, 438 (4th Cir. 2003). However, under 28 U.S.C. § 2254, "the scope of our review is highly constrained." *Jackson v. Johnson*, 523 F.3d 273, 276 (4th Cir. 2008). We may only grant Powell relief if the state court's adjudication of his claims (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1); or (2) "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2).

The "contrary to" and "unreasonable application" clauses of § 2254(d) have independent meanings. *Tucker*, 350 F.3d at 438. A state court's decision is "contrary to" clearly established federal law under §

2254(d)(1) when it "applies a rule that contradicts the governing law set forth" by the United States Supreme Court, or "confronts a set of facts that are materially indistinguishable from a decision of ... [the Supreme] Court and nevertheless arrives at a result different from ... [that] precedent," *Williams v. Taylor,* 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

A state court's decision involves an "unreasonable application" of clearly established federal law under § 2254(d)(1)" if the state court identifies the correct governing legal rule from ... [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams,* 529 U.S. at 407, 120 S. Ct. 1495. This standard is quite deferential: "The state court's application of clearly established federal law must be 'objectively unreasonable,' and 'a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" *Robinson v. Polk,* 438 F.3d 350, 355 (4th Cir. 2006) (quoting *Williams,* 529 U.S. at 411, 120 S. Ct. 1495). Moreover, when "assessing the reasonableness of the state court's application of federal law, the federal courts are to review the result that the state court reached, not whether [its decision] [was] well reasoned." *Wilson v. Ozmint,* 352 F.3d 847, 855 (4th Cir. 2003) (quotation marks omitted).

Similarly, a petitioner alleging that a state court

based its decision on an "unreasonable determination of the facts" under § 2254(d)(2) must satisfy a demanding standard: "The question ... is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable-a substantially higher threshold." *Schriro v. Landrigan,* 550 U.S. 465, 127 S. Ct. 1933, 1939, 167 L. Ed. 2d 836 (2007). Finally, § 2254(e)(1) provides that a state court's factual decisions "shall be presumed to be correct" and that the petitioner bears the burden of "rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C § 2254(e)(1).[4]

B.

We begin with Powell's double jeopardy claim. Powell asserts two arguments in this regard. First, he contends that the gradation offenses charged at both trials were the same-that is, he was tried for capital murder during the rape or attempted rape of Stacey in both trials. Alternatively, if we decide the same offense was not charged in both trials, Powell nevertheless argues that the crime charged in the second trial had actually been litigated in the first trial, even if not formally charged. Conversely, the Commonwealth argues that the capital murder

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[4] Moreover, in cases proceeding under either § 2254(d)(1) or § 2254(d)(2), we can only grant the petitioner relief if the error had "a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 637, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993) (quotation marks omitted).

charges were different in each trial-that is, Powell was charged with the capital murder of Stacey during the rape or attempted rape of Kristie in the first trial and charged with the capital murder of Stacey during the rape or attempted rape of Stacey in the second trial.

The Double Jeopardy Clause prohibits any person from being put in jeopardy twice for the same offence. *See* U.S. Const. amend. V. The Supreme Court held in *Sanabria v. United States,* 437 U.S. 54, 64, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978) (citing *Ball v. United States,* 163 U.S. 662, 670, 16 S. Ct. 1192, 41 L. Ed. 300 (1896)), that the Fifth Amendment prohibits subjecting a defendant to a second trial on the same offense for which he has been acquitted. In *Sanabria,* the Court stated that when a defendant is charged with several violations of the same criminal statute, the appropriate double jeopardy inquiry is whether the legislature intended the charged violations to be separate "allowable unit[s] of prosecution." *Id.* at 70, 98 S. Ct. 2170. Stated differently for purposes of this case, the issue is whether the Virginia legislature intended that a defendant could be charged with multiple counts of capital murder where there is one murder victim accompanied by multiple gradation offenses.

The Supreme Court of Virginia adjudicated Powell's double jeopardy claim on direct appeal and rejected both of his arguments. *Powell II,* 267 Va. 107, 590 S.E.2d 537. In analyzing Powell's first argument, the court cited its precedent holding that the General

Assembly of Virginia intended that a defendant may be prosecuted for multiple violations of the Virginia capital murder statute where, as here, there is a single murder victim but different gradation crime victims. *Id.* at 553 (citing *Payne v. Commonwealth,* 257 Va. 216, 509 S.E.2d 293 (1999)). The state court found that the capital murder charge in the second trial alleging the murder of Stacey and attempted rape of Stacey was a distinct and separate crime from the offense charged in the first trial-namely, the capital murder of Stacey during the commission of, or subsequent to, Powell's rape of Kristie.

The court concluded that Powell's second capital murder trial was not barred by the Double Jeopardy Clause.

As to Powell's first argument, we hold that the Virginia Supreme Court's decision was consistent with Supreme Court precedent and was not an unreasonable application of federal law. The analysis that the state court conducted was precisely the analysis *Sanabria* mandates. Therefore, the decision was not contrary to clearly established federal law. Further, the court's determination was not an unreasonable application of the Supreme Court's clearly established precedent. *Sanabria* requires a court to determine whether the legislature intended to allow multiple charges under the statute. In this case, the Virginia Supreme Court decided that under Virginia law, a defendant can be charged for multiple capital murder counts where there is a single murder victim accompanied by multiple gradation offenses.

Id. Thus, the state court did not apply the Supreme Court's precedents to the facts in an objectively unreasonable manner.

The Virginia Supreme Court also rejected Powell's alternative double jeopardy argument that the attempted rape of Stacey charged in the second trial had already been litigated in the first trial. The court relied on settled state law that Stacey's attempted rape was not at issue in the first trial because the Commonwealth's bill of particulars limited the first trial solely to the capital murder of Stacey subsequent to, or in the commission of, the rape of Kristie. *See Powell II,* 590 S.E.2d at 554 (holding that "by naming a specific victim of the gradation offense in a bill of particulars, jeopardy will attach only to the capital murder charge as made specific by the bill of particulars").[5] In reaching this result, the

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[5] A defendant does not have a right to a bill of particulars in Virginia. *See Quesinberry v. Commonwealth,* 241 Va. 364, 402 S.E.2d 218, 223 (1991) (holding whether the Commonwealth is required to file a bill of particulars lies within the discretion of the trial court). Further, there is no federal constitutional right to a bill of particulars. *See United States v. Bales,* 813 F.2d 1289 (4th Cir. 1987) (internal citations omitted). The purpose of a bill of particulars is "to state sufficient facts regarding the crime to inform an accused in advance of the offense for which he is to be tried." *Quesinberry,* 402 S.E.2d at 223 (citing *Hevener v. Commonwealth,* 189 Va. 802, 54 S.E.2d 893, 899 (1949)). Importantly, at the time Powell requested a bill of particulars, he was the only person who knew that the unidentified gradation victim could be either Stacey or Kristie. Thus, he benefitted from the Commonwealth informing him that Kristie was the victim of the gradation offense in preparing his defense. Finally, in a jury trial, jeopardy attaches when a

court followed its precedent holding that "the bill of particulars and the indictment must be read together" as specifying the crime charged. *See Livingston v. Commonwealth,* 184 Va. 830, 36 S.E.2d 561, 565 (1946). The court recognized that the original indictment in the first trial did not identify the name of the victim of the gradation offense. However, upon Powell's request, the Commonwealth specified in a bill of particulars that the charged offense only involved Kristie as the victim of the gradation offense. Thus, the court concluded that Powell was only tried in the first trial for the capital murder of Stacey during the commission of, or subsequent to, the rape of Kristie. *See Powell II,* 267 Va. 107, 590 S.E.2d 537. Based on established state law principles, the court ruled that Powell's second trial was not a double jeopardy violation because the indictment in the second trial charged a crime not charged in the first trial.

Powell argues that this holding was an unreasonable determination of the facts in light of the evidence presented at trial. He claims, among other arguments, that the bill of particulars did not limit the charge because the jury heard argument from the prosecutor that Powell "wanted something more"

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jury is empanelled and sworn. *Serfass v. United States,* 420 U.S. 377, 388, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975) (citing *Downum v. United States,* 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963)). It is clear that at the time the jury was sworn in Powell's first trial, Powell was only in jeopardy, so far as is relevant here, for the murder of Stacey during the rape of Kristie as specified by the bill of particulars.

from Stacey, the jury heard testimony from witnesses suggesting that Stacey refused to have sex with Powell, and the jury was not told about the limitation of the bill of particulars.

Powell's argument falls short of showing an unreasonable determination of the facts in light of the evidence presented. First, under settled Virginia precedent, the court determined that, as a matter of state law, Powell was not charged with the attempted rape of Stacey in the first trial. Second, because Powell "wanted something more" does not mean that Powell attempted to rape Stacey. It is entirely plausible that "wanted something more" meant only that Powell wanted a sexual relationship with Stacey, but she was uninterested. This is not a basis for a charge of attempted rape. Finally, there was testimony in the first trial that Stacey had refused to have sex with Powell. Again, rejecting sexual advances, without more, is not evidence of an attempted rape. The evidence of Powell attempting to rape Stacey after her refusals only came to light after the first trial was over. If the Commonwealth had been prosecuting Powell for this gradation offense, it would not have restricted the bill of particulars to identifying only Kristie as the victim of the gradation offense. Clearly, the state court's determination that the charge that Powell had attempted to rape Stacey was not litigated in the first trial was not an unreasonable determination of the facts in light of the evidence presented.[6]

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[6] The dissent's criticism of our decision rests on a misunderstanding of the facts of this case. When one reviews

Accordingly, we find no error in the state court's application of federal law.[7]

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the record of the first trial it becomes clear that no one involved litigated as though Powell was being tried for murder during the rape or attempted rape of Stacey. The Commonwealth certainly did not offer evidence on that purported charge during that trial. Moreover, the bill of particulars unambiguously identified Kristie only as the victim of the rape or attempted rape, and Powell's trial counsel clearly recognized this fact as evidenced by their comments to the court and to the jury. *See, e.g.,* Record, Vol. 2, at 1068 ("The rape involved Kristi[e], not Stac[ey]"); Record, Vol. 2, at 1052 ("Stac[ey] is the victim or alleged victim on the capital murder, the robbery, and the attempted robbery. And ... Kristi[e] the victim or alleged victim on rape ..."); Record, Vol. 2, at 995 ("and on the rape allegation, obviously, Kristi[e] Reed"); Record, Vol. 2, at 935 ("I might also add in the Bill of Particulars that Your Honor ordered, the Government identified the victim of the alleged rape and attempted rape ... as being Kristie, not Stac[ey], but Kristie").

The trial judge likewise recognized this fact. For example, the trial judge instructed the jury that "[s]exual intercourse means an actual penetration, no matter how slight, of the Defendant's penis into the sexual organ of Kristi[e] Reed." Record, Vol. 2, at 1024-25. Although the dissent contends that the trial judge's response to the jury question suggests that he was confused as to the identity of the rape victim, the proceedings that followed the receipt of the question demonstrate that the judge was not confused on that point. It is clear that the trial judge was not concerned with who the victim of the rape was; instead, he was concerned with the timing of the rape of Kristie and whether the murder of Stacey could be found to have occurred "subsequent to" or "during the commission of" the rape of Kristie. *See* J.A. 53-55, 62.

[7] Related to his double jeopardy claim, Powell argues that his second trial is barred by principles of collateral estoppel. *See Ashe v. Swenson,* 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Although the state argues this claim is procedurally

C.

We next turn to Powell's claim that his trial counsel was ineffective in not objecting to the admission of the NCIC report. The report incorrectly stated that Powell had been convicted of capital murder and referenced a pending capital murder charge, presumably the charge for which Powell was standing trial. Finally, the report contained correct entries that Powell asserts were inadmissible at trial, such as charges that were *nolle prossed* or for which Powell was found not guilty.

In *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the Supreme Court articulated the relevant standard for a claim of ineffective assistance of counsel:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components.
>
> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed

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defaulted, we find that it lacks merit in any event. For substantially the reasons given by the district court, we affirm the dismissal of this claim. *See Powell V,* 531 F. Supp. 2d at 724-25

> the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687, 104 S. Ct. 2052.

The Supreme Court of Virginia found, in its first opinion denying Powell's state habeas petition, that there was a single capital murder conviction entry listed on the NCIC report. *Powell III,* 2005 WL 2980756, at 14. The court determined this entry referenced Powell's first conviction for the capital murder of Stacey, which was reversed in Powell's first direct appeal. *Id.* Powell petitioned the court for rehearing on this issue and the court granted his motion. *See Powell IV,* 272 Va. 217, 634 S.E.2d 289. On rehearing, the court found that there was an additional incorrect capital murder conviction entry in the NCIC report that referred to Powell's conviction for the attempted capital murder of Kristie. After acknowledging these errors, the court found that there was no valid claim for ineffective assistance of counsel under *Strickland* because Powell could not demonstrate prejudice. *Id.* at 299, 272 Va. 217.

Powell contends that the state court's interpretation of the inaccuracies in the report is itself error because the court's determinations of what the state capital convictions actually meant was based on speculation. However, Powell's arguments fails. We must presume the correctness of a state court's factual determination unless the habeas petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Powell has offered no clear and convincing evidence to rebut the presumption of correctness that we afford the state court's factual findings.

Next, Powell contends that the state court unreasonably applied *Strickland* because he has shown that his trial counsel was ineffective in failing to object to the NCIC report. We disagree. Under *Strickland,* Powell must show that "there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695, 104 S. Ct. 2052. Stated differently, Powell can show prejudice and is entitled to relief only if he can show that had the NCIC report not been admitted, "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins v. Smith,* 539 U.S. 510, 537, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Absent this showing, Powell is not entitled to relief.

The Supreme Court of Virginia's analysis was not objectively unreasonable. The court listed the

overwhelming evidence presented to the jury that demonstrated Powell's future dangerousness. This evidence included, *inter alia:* 1) the heinous details of the crimes; 2) the letter Powell wrote to the prosecutor following the first trial divulging of the circumstances of Stacey's attempted rape and death; 3) a taunting letter Powell wrote to Stacey's mother;[8] 4) another letter Powell wrote to the Commonwealth's Attorney stating that he wanted to get out of prison to "kill ... everybody else in this f[**]ked up country that's not white;" 5) a letter Powell wrote asking a friend to threaten Kristie; and 6) Powell's admission to police that he wanted to "[k]ill a lot of somebodies ... [j]ust for something to do." *See Powell IV,* 634 S.E.2d at 290-94. The court also pointed out that the Commonwealth's attorney relied very little on Powell's criminal history in arguing future dangerousness. *See Id.* at 297, 272 Va. 217. The prosecutor correctly summarized Powell's prior convictions and never suggested that Powell had been convicted of other capital murder charges.

The state court balanced the aggravating evidence against the limited use of the NCIC report and noted

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[8] While incarcerated, Powell sent a letter to Lorraine Reed, the mother of Stacey and Kristie. Powell enclosed a photograph of a woman who resembled Stacey and who was naked from the waist up. Among other things, Powell asked Lorraine for her help in identifying who the woman in the picture resembled, directed Lorraine to ask Kristie for help if she could not determine who it resembled, and asked Lorraine to give his address to the person about whom he was referring.

that "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 298, 272 Va. 217 *citing Strickland,* 466 U.S. at 696, 104 S. Ct. 2052. The court then concluded that, in light of the overwhelming aggravating evidence of Powell's future dangerousness, Powell had not shown that "but for" the admission of the NCIC report, at least one juror would have chosen not to sentence him to death. Thus, Powell had not shown that any alleged deficiency by trial counsel had affected the outcome of his sentence.

Powell's ineffective assistance of counsel claim fails. The state court properly applied *Strickland* to the facts of this case. First, it is reasonable to believe the jury understood Powell had not previously been convicted of the capital murder of two other victims in addition to Stacey. The jury knew Powell's previous conviction of the capital murder of Stacey had been successfully appealed and vacated based on the contents of Powell's letter to the Commonwealth's attorney. Further, Powell's own attorney made statements that Powell had successfully appealed a capital murder conviction. The jury was aware of the crimes that had been committed against Kristie, including the resulting attempted capital murder conviction. *See id.* Thus, it is reasonable that the jury, upon seeing the two entries for capital murder, would understand that the NCIC report's entries were inaccurate and actually referred to the attempted capital murder of Kristie and the vacated conviction for the capital

murder of Stacey.

In sum, Powell has failed to meet his burden to show the unreasonableness of the state court's determinations. We conclude that the state court's determination that Powell had not shown prejudice is not an unreasonable application of Supreme Court precedent or based on an unreasonable determination of the facts in light of the evidence presented at trial. Therefore, we affirm the dismissal of this claim.[9]

D.

We now turn to Powell's final claim that his trial counsel was ineffective by failing to investigate and

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[9] Powell asserts three other reasons that the state court unreasonably applied federal law. First, Powell argues the state court failed to consider the totality of the evidence in performing its prejudice analysis. Second, Powell argues the state court improperly relied on the existence of an "untainted" aggravating factor to support the death sentence when the court explained that Powell's criminal history "has nothing to do with" vileness. We have reviewed the record in this regard and find no basis for relief.

Finally, Powell argues that the state court unreasonably applied *Strickland* by using an improperly elevated standard of prejudice. The state court described *Strickland*'s standard as "highly demanding." *Powell IV,* 634 S.E.2d at 296 *quoting Kimmelman v. Morrison,* 477 U.S. 365, 382, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Powell's argument in this regard is not persuasive. In reviewing the state court's opinion, it is clear that it did not require a more demanding showing under *Strickland;* rather, the court was simply commenting that the standard was high and Powell had not met it.

present all reasonably available mitigating evidence. Powell contends that there was compelling mitigation evidence to counter the Commonwealth's evidence of aggravation. Powell maintains that counsel failed to counter the Commonwealth's arguments that, *inter alia,* he: held racist beliefs and tortured animals; was inherently violent; had no remorse; and was of above average intelligence. Generally, Powell contends that counsel was ineffective in failing to offer the following evidence: that Powell made racist statements for their shock value on listeners, rather than as expressions of true beliefs; that he was actually kind to animals; that he had never been inherently violent; that numerous persons witnessed him showing serious remorse for his crime; and that he is not of above average intelligence.

It is well-established that an individual claiming ineffective assistance of counsel must show, first, that counsel's performance was deficient, in that it "fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688, 104 S. Ct. 2052. Once counsel conducts a reasonable investigation of law and facts in a particular case, his strategic decisions are "virtually unchallengeable." *Id.* at 690, 104 S. Ct. 2052. Tactical or reasonable professional judgments are not deficient but a failure to investigate a material matter due to inattention may be deficient. When the claim is that counsel failed to present a sufficient mitigating case during sentencing, the inquiry "is not whether counsel should have presented a mitigation case" but "whether the

investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable." *See Wiggins,* 539 U.S. at 523, 123 S. Ct. 2527 (internal citations omitted).

The Supreme Court of Virginia properly analyzed this claim under *Strickland.* Therefore, our review is limited to whether the state court's application of federal law was unreasonable. The Supreme Court of Virginia examined each claim and properly made a determination under *Strickland* of whether Powell had shown deficiency of counsel's performance and prejudice. We have examined each of Powell's contentions and find that the state court's determinations were not an unreasonable application of *Strickland.* Therefore, we affirm the dismissal of this claim.

III.

Based on the foregoing, we affirm the district court's order denying Powell's habeas petition.

AFFIRMED

GREGORY, Circuit Judge, concurring in part and dissenting in part:

I concur with the reasoning of the majority's opinion on Powell's ineffective assistance of counsel claims. However, I find nothing reasonable about the Supreme Court of Virginia's finding in *Powell II* that the bill of particulars nullified the Commonwealth's conduct at Powell's first trial. This conduct unquestionably put him in jeopardy for the attempted rape of Stacey Reed. Even taking into account the nearly insurmountable burden placed on Powell by virtue of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), I am left with the firm conclusion that the Supreme Court of Virginia's post-hoc rationalization in *Powell II* is an unreasonable determination of the facts in light of the evidence presented, and thus Powell's conviction for capital murder must be reversed.

The Fifth Amendment to the United States Constitution provides that no "person be subject for the same offense to be twice put in jeopardy of life or limb." There can be no doubt that Powell was actually put in jeopardy for the gradation offense of the attempted rape of Stacey during the first trial, and thus his second capital murder trial violated the Double Jeopardy Clause. Although the bill of particulars purportedly identified Kristie Reed as the victim of the gradation offense, the Commonwealth nevertheless argued throughout the first trial that Powell attempted to rape Stacey prior to her murder. In the Commonwealth's opening argument, counsel stated:

> Stacie [sic], the older girl, knew the Defendant, had met him sometime before. They had a friendship, a social acquaintance. You'll hear evidence that *he wanted more from her than that.* You'll hear evidence that she was cool towards him.
>
> ....
>
> ... And on the afternoon of the 29th, there was nobody home with Stacie [sic] when he came over and they argued about this boy that she was dating. *And he wanted something from her and she wasn't going to give it to him and for that she lost her life.*

(J.A. 24-25 (emphasis added).) During the trial, the Commonwealth put on circumstantial evidence suggesting that Powell had attempted to rape Stacey, and even argued as much to the trial court. In response to Powell's motion to strike the indictment for insufficiency of the evidence, counsel argued that

> [W]e have evidence here, again, from Mr. Neff that according to him *[Powell] was having sex or attempting to have sex with Stacie [sic] when the phone rang.* When she got up and answered the phone, then she wanted nothing to do with him, and at that point in time he got mad and said-the testimony was, he said, "It was that nigger, wasn't it?" He pulled out his knife and stabbed her.

> *Again, evidence, in that regard of his intent to rape and have sex and wanting sex.*

(J.A. 43 (emphasis added).) Furthermore, the Commonwealth elicited testimony from Officer Daigneau, who testified that a physical evidence recovery kit had been obtained from Stacey and such kits are "routinely done in cases of sexual assault." (J.A. 29; *see also* J.A. 29-31.)

Tellingly, at no time during the trial did the Commonwealth ever specifically identify Kristie as the victim of the gradation offense.[1] Nor did the trial court make any attempt to clarify that the bill of particulars identified Kristie as the victim of the gradation offense. In its instructions to the jury, the trial court stated that

> [t]he Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:
>
> 1. That the defendant killed Stacie [sic] Reed; and

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[1] While the majority points out that the evidence presented by the Commonwealth during the first trial was "not a basis for a charge of attempted rape" (Maj. Op. 667), that analysis conflates the issue of whether an individual was put in jeopardy for an offense with the issue of whether the prosecution put on sufficient evidence to convict an individual for that offense. The Commonwealth did not fail to prosecute Powell for the attempted rape of Stacey, it just failed to do so successfully, and the majority misses that point in its analysis.

2. That the killing was willful, deliberate and premeditated; and

3. That the killing occurred during the commission of robbery and/or attempted robbery and/or during the commission of, or subsequent to *rape.*

(J.A. 59 (emphasis added).) With regard to first-degree murder, the trial court gave similarly broad instructions:

If you find from the evidence that the Commonwealth has failed to prove that the killing was deliberate and premeditated, but the killing was willfully committed during the commission of robbery or attempted robbery *and/or rape or attempted rape,* you shall find the defendant guilty of first degree murder.

(J.A. 60 (emphasis added).) Given the lack of specificity in the jury instructions, it is not surprising that during deliberations the jury asked: "Can a guilty verdict for the rape of Kristie be used to satisfy jury instruction number 4, element 3?"[2]

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[2] In fact, the trial judge initially indicated that the answer to this question was "no." (J.A. 53.) Such an answer would only make sense if the judge thought that the attempted rape of Stacey would satisfy the requirement of the gradation offense and that the jury could convict Powell of that offense.

(J.A. 62.) The fact that the jury needed to ask this question demonstrates that the jury was unaware that the bill of particulars identified Kristie as the sole victim of the gradation offense, and it further implies that the jury was considering the rape or attempted rape of both Stacey and Kristie in reaching its verdict.

On appeal, the Supreme Court of Virginia itself recognized that Powell had been put in jeopardy for the rape or attempted rape of Stacey, and indeed based its decision in part on that finding. *See Powell I*, 552 S.E.2d at 363. After reversing Powell's capital murder conviction because the indictment had been improperly amended, the court continued:

> [W]e now further determine that there is no basis upon which Powell can be retried for capital murder on remand. The poll of the jury establishes that Powell was acquitted of the charge of capital murder in the commission of robbery or attempted robbery. *It is equally clear that there is simply no evidence upon which the jury could have relied to find that Powell committed or attempted to commit any sexual assault against Stacey before or during her murder,* or that the rape of Kristie did not occur after the murder of her sister....
>
> For these reasons, we will reverse Powell's conviction for capital murder, affirm his convictions for abduction, rape, attempted capital murder, and grand larceny, and remand the case for a new trial on a charge of *no greater than first*

> *degree murder for the killing of Stacey Reed,* if the Commonwealth be so advised.

Id. (emphasis added). It is perplexing that the Supreme Court of Virginia would have made such a finding if, in fact, the rape or attempted rape of Stacey had not been litigated in the first trial.

In affirming Powell's capital murder conviction in *Powell II,* however, the Supreme Court of Virginia reversed course. The court characterized its earlier references to the sexual assault of Stacey as merely "'the circumstances of this case'" as they existed at the time of the first trial, 590 S.E.2d at 552 (quoting *Powell I,* 552 S.E.2d at 363). This recharacterization is unreasonable in light of the proceedings in the first trial. At every turn, the Commonwealth, the trial court, the jury, and even the Supreme Court of Virginia acted as though Powell were on trial for the murder of Stacey in the commission of any rape or attempted rape, and not specifically on trial for the murder of Stacey in the commission of the rape of Kristie.

Like the Supreme Court of Virginia, the majority claims that "no one involved litigated as though Powell was being tried for murder during the rape or attempted rape of Stacey." (Maj. Op. 667 n.6.) Yet, the majority provides no explanation for why the Commonwealth elicited testimony that police officers performed a physical evidence recovery kit on Stacey or made intimations that Powell attempted to sexually assault Stacey. (*See* J.A. 29, 24-25.) These

actions demonstrate that the Commonwealth did litigate as if Powell were on trial for the murder of Stacey in the commission of her rape or attempted rape.

In further support of its finding that Powell had not already been put in jeopardy for the rape or attempted rape of Stacey, the Supreme Court of Virginia found that the bill of particulars served to narrow the offense of jeopardy to include only the rape of Kristie:

> [W]here, prior to the attachment of jeopardy, the Commonwealth limits the prosecution of a capital murder, undifferentiated in the indictment by the identity of the victim of the gradation offense, by naming a specific victim of the gradation offense in a bill of particulars, jeopardy will attach only to the capital murder charge as made specific by the bill of particulars.

Powell II, 590 S.E.2d at 554. The majority now relies on this holding in finding that the Supreme Court of Virginia committed no reversible error in its application of federal law. (*See* Maj. Op. 665-67.)

Even assuming that this holding is not unreasonable as a matter of law, it overlooks the fact that the Commonwealth did *not* actually limit its prosecution for capital murder to the rape of Kristie. Moreover, neither the prosecution nor the trial court ever specified to the jury that the bill of particulars identified Kristie as the victim of the gradation

offense. Had the trial court excluded evidence suggesting that Powell had attempted to rape Stacey or clarified that the attempted rape of Stacey could not satisfy the requirements of the gradation offense, the Commonwealth would have a stronger argument that the bill of particulars had a limiting effect-but that is not the case here. Instead, the bill of particulars operated as a double-edged sword for Powell: on one hand, the Commonwealth ignored its import in putting on circumstantial evidence suggesting that Powell had sexually assaulted Stacey before her murder, while on the other hand the Commonwealth was able to use the bill of particulars as a safety valve to later retry Powell for capital murder when new evidence came to light.

Notwithstanding the above analysis, the majority concludes that the rape or attempted rape of Stacey was somehow not litigated because Powell's trial counsel "clearly recognized" the limiting effect of the bill of particulars, "as evidenced by their comments to the court and to the jury." (Maj. Op. 667 n.6.) Again, the majority misses the point. I agree that Powell's trial counsel understood that the bill of particulars should limit the prosecution of the gradation offense. Indeed, Powell's trial counsel submitted proposed jury instructions specifying that Kristie was the victim of the gradation offense. (R. vol. 21 at 1213.) The problem is that despite counsel's exhortations, the trial court did not use the proposed jury instructions or otherwise clarify this point to the jury.

Finally, the majority contends that the trial judge impliedly recognized the effect of the bill of particulars when he instructed the jury that "[s]exual intercourse means an actual penetration, no matter how slight, of the Defendant's penis into the sexual organ of Kristi[e] Reed." (R. vol. 20 at 1024-25.) But the majority takes this instruction out of context. Along with capital murder, Powell was charged with the rape of Kristie. It was in instructing the jury on this latter charge that the trial judge used the phrase "sexual intercourse."[3] (R. vol. 20 at 1020.) Thus, when the trial judge clarified the definition of sexual intercourse, it was for the purposes of the rape charge, which specified Kristie as the victim, and not the capital murder charge, *which did not specify Kristie as the victim.*

Undoubtedly, the crimes committed by Paul Powell were atrocious. Given the explicit details revealed by Powell in his letter to the Commonwealth's attorney, one understands the strong inclination to prosecute

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[3] The trial judge gave the following instructions on the rape charge: "The Commonwealth must prove beyond a reasonable doubt each of the following elements of th[e] crime [of rape]: One, that the Defendant had sexual intercourse with Kristi[e] Reed; and two, that it was against her will and without her consent; and three, that it was by force, threat, or intimidation." (R. vol. 20 at 1020.) By contrast, the trial judge gave the following instructions on the capital murder charge: "The Commonwealth must prove beyond a reasonable doubt each of the following elements of th[e] crime [of capital murder]: ... 3. That the killing occurred during the commission of robbery and/or attempted robbery and/or during the commission of, or subsequent to rape." (J.A. 59.)

Powell for those heinous acts. Yet, it is in these very cases that we must be most vigilant in protecting our long-standing constitutional guarantees. The Double Jeopardy Clause makes no distinction between the innocent and the guilty, nor any exception based on the severity of the offense or the personal attributes of the accused. In finding that the attempted rape of Stacey had not been litigated in the first trial, the Supreme Court of Virginia made an unreasonable determination of the facts in light of the conduct of all parties involved in that trial. This determination had the unconstitutional effect of permitting the Commonwealth to try Powell a second time in violation of his Fifth Amendment rights. Given this outcome, Powell's second capital murder conviction should not stand, and I must dissent.

Appendix B

United States District Court,
Eastern District Virginia,
Alexandria Division.

Paul Warner POWELL, Petitioner,
v.
Loretta K. KELLY, Warden, Sussex I State Prison,
Respondent.
No. 1:07cv59.

Jan. 11, 2008.

MEMORANDUM OPINION

T.S. ELLIS, III, District Judge.

Petitioner Paul Warner Powell's petition for habeas corpus relief encompasses two capital murder trials on two different indictments. Powell was first convicted of capital murder in the Circuit Court for Prince William County in 2000, and was thereafter sentenced to death. The Supreme Court of Virginia vacated the conviction and remanded, limiting retrial on the specific charged offense to non-capital murder. Apparently flush with his success, Powell rashly wrote a letter to the Prince William County Comonwealth's Attorney, mocking the prosecution and describing additional facts about the crimes that were unknown to the Commonwealth during the first trial. Based on these new facts, the Commonwealth's Attorney elected to *nolle prosequi* the remanded

charges and to seek instead a new indictment against Powell. Accordingly, Powell was tried on this new indictment and was again convicted and sentenced to death. This time, his direct appeal to the Supreme Court of Virginia failed. After unsuccessfully challenging the second conviction and sentence in collateral state proceedings, Powell filed a petition in this district seeking a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Commonwealth responded by filing a motion to dismiss, which is now at issue, as it has been fully briefed and argued. For the reasons set forth here, the Commonwealth's motion to dismiss must be granted.

I.

In his first trial, Powell was tried on the following charges: (i) the capital murder of Stacey Lynn Reed ("Stacey") in the commission of robbery and/or attempted robbery, in violation of Va. Code § 18.2-31(4); (ii) the capital murder of Stacey in the commission of, or subsequent to, the rape and/or attempted rape of Stacey's sister, Kristie Erin Reed ("Kristie"), in violation of Va. Code. § 18.2-31(5)[1]; (iii)

[1] The charge of the capital murder of Stacey during the commission of, or subsequent to, the rape or attempted rape of Kristie was not included in the original indictment, but the trial court allowed the Commonwealth to amend the indictment to add this charge. The amended indictment did not name Kristie as the victim of rape or attempted rape, but the Commonwealth provided a bill of particulars at Powell's request that named Kristie as the sole victim of the alleged rape or attempted rape that accompanied the murder of Stacey.

the abduction, rape, and attempted capital murder of Kristie, in violation of Va. Code §§ 18.2-48, -61, -31(5), -26; (iv) grand larceny, in violation of Va. Code § 18.2-95; (v) robbery and attempted robbery, in violation of Va. Code § 18.2-58; and (vi) three counts of the use of a firearm, in violation of Va. Code § 18.2-53.1. The jury convicted Powell of (i) the capital murder of Stacey subsequent to or in the commission of the rape of Kristie, (ii) the abduction, rape, and attempted capital murder of Kristie, and (iii) grand larceny, but acquitted him of the three remaining charges. *See Powell v. Commonwealth,* 261 Va. 512, 552 S.E.2d 344, 355 (2001); *see also Powell v. Commonwealth,* 267 Va. 107, 590 S.E.2d 537, 543 (2004). On direct appeal, the Supreme Court of Virginia described the facts relating to Powell's convictions, in this first trial, as follows:

> Powell was acquainted with Stacey Lynn Reed (Stacey) for two and a half years prior to the commission of the crimes in question. Kristie Erin Reed (Kristie), Stacey's younger sister, described her sister and Powell as "[f]riends." Powell, who was 20 years old at the time of the murder, had wanted to date Stacey, who was 16 years old, but recognized that she was underage and he "could go to jail for that."
>
> Powell, a self-avowed "racist and white supremacist," was aware that Stacey, who was white, was dating Sean Wilkerson, who is black. Wilkerson had recently moved to another locality, but he and Stacey remained in contact. Stacey was

a member of her high school's Junior Reserve Officer's Training Corps and planned to attend a military ball with Wilkerson.

Just before noon on January 29, 1999, Stacey arrived home from school early, having completed her examinations that were being given that day. Powell was waiting for her at her home when she arrived. When Powell learned that Robert Culver, a friend of the girls' mother, would be home shortly for lunch, Powell left and returned at about 12:45 p.m., after Culver had left. When Powell returned, he was armed with a "survival" knife, a "butterfly" knife, a box cutter, and a 9-millimeter pistol.

Stacey was talking to Wilkerson on the telephone. After Stacey ended the telephone conversation, Powell confronted her about her relationship with Wilkerson. He demanded that Stacey end her relationship with Wilkerson. According to Powell, he and Stacey argued, and the argument grew into a struggle. Powell drew the survival knife from his belt and Stacey "got stuck." Powell denied stabbing Stacey deliberately. The struggle continued briefly until Stacey collapsed on the floor in her sister's bedroom.

Although Powell did not know whether Stacey was still alive, he made no effort to determine her condition or call for medical assistance. Powell "wandered around the house, got some iced tea, had a cigarette." Kristie arrived home from school shortly after 3 p.m. and was met at the door of the

home by Powell. Powell told her that Stacey was in her room, but moments later Kristie discovered her sister's body in Kristie's bedroom. She dropped her schoolbooks and began to cry.

Powell ordered Kristie to go to the basement. Kristie, who knew that Powell was usually armed, complied because she "didn't want to die." In the basement, Powell ordered Kristie to remove her clothes and to lie on the floor. Powell then raped Kristie, and she "begg[ed] him not to kill her." Powell later admitted that he knew that Kristie, who was 14 years old at the time of the rape, had been a virgin.

While Powell and Kristie were in the basement, Mark Lewis, a friend of Kristie, came to the house and knocked on the door. When Powell heard the knock, he tied Kristie's legs together and tied her hands behind her back with shoelaces he cut from her athletic shoes. Powell then dressed and went upstairs.

While Powell was upstairs, Kristie managed to loosen the bonds on her hands and attempted to "scoot across the floor to hide" under the basement steps. Hearing Powell coming back to the basement, she returned to the position on the floor where he had left her. Powell then strangled Kristie with a shoelace and she lost consciousness. While she was unconscious, Powell stabbed Kristie in the abdomen and slit her wrists and throat.

Powell returned upstairs, searching for "anything worth taking." He fixed another glass of iced tea, which he took with him when he left the home a short time later. Powell went to a friend's house and then drove with the friend to the District of Columbia to buy crack cocaine.

Kristie regained consciousness sometime after Powell had left her home. About 4:10 p.m., she heard Culver return home, and she called out his name. Culver discovered Kristie in the basement, called the 911 emergency response telephone number, and began rendering first aid to her. He later discovered Stacey's body upstairs. Shortly thereafter, paramedics arrived. In response to a question from one of them, Kristie identified Powell as her attacker. Powell was arrested later that day at the home of his friend's girlfriend, where he and the friend had gone after buying drugs.

Kristie was transported by helicopter to Inova Fairfax Hospital where she received treatment for her injuries. It was ultimately determined that the wounds to her throat and abdomen each came within one centimeter of severing a major artery which likely would have caused her death.

An autopsy revealed that Stacey had died from a knife wound to the heart. The medical examiner testified that there was a single entrance wound and two exit wounds indicating that the knife had been withdrawn, at least partially, and then reinserted into the heart. One wound path pierced

the left ventricle and the other went through both the left and right ventricles, exiting the heart at the back of the right ventricle.

Stacey's body also exhibited a number of *bruises on the head*, chest, abdomen, back, arms, and legs, *abrasions on the face*, a stab wound to the back, and a cut and scrapes on the left forearm. The autopsy further revealed that Stacey had been struck on the head with sufficient force to cause bleeding inside her scalp and in the membranes surrounding her brain prior to death. These injuries were not consistent with Stacey merely having fallen during a struggle.

The DNA profile obtained from the blood found on Powell's survival knife was consistent with the DNA profile of Stacey's blood. The DNA profile obtained from sperm fractions from swabs taken from Kristie's vagina and perianal area was the same profile as that obtained from Powell's drawn blood sample.

While in jail, Powell wrote letters to friends in which he admitted having committed the murder, rape, and attempted murder because of Stacey's relationship with a black man. He further claimed that he had planned to kill Stacey's family and steal the family's truck. Powell also wrote to a female friend and asked her to "get one of [her] guy friends ... to go to a pay phone and call Kristie and tell her [that] she better tell the cops she lied to them and tell her [that] she better not testify

against me or she's gonna die."

Powell told another inmate that he had become angry with Stacey when she refused to have sex with him after talking to Wilkerson. Powell told the inmate that he stabbed Stacey twice and that when he attempted to cut Kristie's throat, his knife was too dull, "[s]o he started stepping on her throat trying to stomp her throat." To another inmate, Powell described Stacey's killing as a "human sacrifice" and expressed satisfaction in having raped a virgin.

Powell, 552 S.E.2d at 347-48.

Following this recitation of the facts, the Supreme Court of Virginia proceeded to affirm Powell's convictions for the abduction, rape, and attempted capital murder of Kristie, and for grand larceny. *Powell,* 552 S.E.2d at 356. The court then went on to reverse Powell's conviction for the capital murder of Stacey in the commission of, or subsequent to, the rape or attempted rape of Kristie, finding, *inter alia,* that the original indictment had been improperly amended to include a charge of capital murder of Stacey "during the commission of or subsequent to rape and/or attempted rape." *Id.* at 357. The court also found the evidence insufficient to support a conviction for the capital murder of Stacey during the commission of, or subsequent to, the rape of Kristie because all of the evidence adduced at trial showed that Kristie was raped *after* Stacey's murder. *Id.* at 363. Accordingly, the Supreme Court of

Virginia remanded the case with instructions that Powell could not be convicted of more than first degree murder on retrial.

While awaiting retrial, Powell, believing he could no longer be tried for capital murder, brashly wrote a letter to the Commonwealth's Attorney who had prosecuted him, taunting the Commonwealth's Attorney and admitting not only to the murder of Stacey, but also revealing that he had attempted to rape Stacey before killing her. This latter admission was new, not previously known to the Commonwealth's Attorney. Armed with this and the other admissions in the letter, the Commonwealth's Attorney *nolle prossed* the indictment in the remanded case and obtained a new indictment against Powell, charging him this time with the capital murder of Stacey "during the commission of or subsequent to the attempted rape of Stacey Lynn Reed." *See Powell,* 590 S.E.2d at 544. Predictably, a centerpiece of the Commonwealth's evidence in this second trial was Powell's letter to the Commonwealth's Attorney. The Supreme Court of Virginia's description of this evidence is helpful.

> Powell stated in the letter that, because he believed he could not be retried for capital murder, "I figured I would tell you the rest of what happened on Jan. 29, 1999, to show you how stupid all y'all ... are." Admitting that he "planned to kill the whole family" on that day, Powell further stated that "I had other plans for [Stacey] before she died." Powell described how he had attempted to initiate

> consensual sexual intercourse with Stacey, which he had previously admitted. Powell then revealed that when Stacey resisted his advances, he pushed her onto her bed and, while sitting on top of her, told Stacey "that we could do it the easy way or the hard way."
>
> Powell then described how Stacey had "started fighting with me and clawed me [sic] face." Powell stated that he "slammed her to the floor ... sat on top of her and pinned her hands down again." Powell claimed that Stacey relented "and I told her if she tried fighting with me again I would kill her."
>
> Continuing, Powell stated that, at his direction, Stacey began to disrobe, but stopped when the telephone rang. Stacey put her clothes back on so that she could answer the telephone. Powell refused to allow Stacey to answer the telephone and ordered her to resume disrobing. When she refused, Powell "pushed her back and pulled out [his] knife." When Stacey attempted to leave the bedroom, Powell stabbed her. Stacey fell back and Powell removed the knife. Stacey then stumbled to another bedroom and collapsed. Powell "saw that she was still breathing" and "started stomping on her throat" until he "didn't see her breathing anymore."

Id. at 544.[2] Based on this and other evidence

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[2] Further demonstrating his callousness and penchant for confessional letter-writing, Powell also sent a letter to Lorraine

presented at the second trial, the jury convicted Powell of the capital murder of Stacey in the commission of, or subsequent to, the attempted rape of Stacey and then unanimously sentenced him to death, finding both vileness and future dangerousness as aggravating factors. *Id.* at 548-49.

Powell again appealed his conviction to the Supreme Court of Virginia, claiming, *inter alia,* (i) that the trial court should have dismissed the second indictment based on the following grounds: (a) the reversal of the first conviction, (b) the "law of the case" doctrine, and (c) the Double Jeopardy Clause; (ii) that testimony about Powell's attack on Kristie should have been excluded during the guilt determination phase as irrelevant and prejudicial; (iii) that Powell's statements to police violated his Sixth Amendment rights and should have been excluded; and (iv) that the trial court erred in limiting Powell's voir dire and failing to strike the venire panel after Powell's attorney informed them that Powell had been previously convicted of capital

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Reed, Stacey's mother, enclosing a photograph of a partially nude woman who resembled Stacey and stating, in part:

> I found this picture in a magazine and it kinda looks like someone I know or used to know, but I can't think of the person's name. I think you know the person too, so I was wondering if you could tell me the name of the person this picture resembles so I can quit racking my brain trying to think of it?

See Powell v. Warden of Sussex I State Prison, 272 Va. 217, 634 S.E.2d 289, 293 (2006).

murder. The Supreme Court of Virginia rejected all of these challenges and affirmed Powell's conviction. *Id.* at 563. The U.S. Supreme Court denied certiorari. *Powell v. Virginia,* 543 U.S. 892, 125 S. Ct. 86, 160 L. Ed. 2d 157 (2004).

Powell then challenged his conviction in collateral state proceedings, raising numerous claims, many of which reiterated claims already rejected by the Supreme Court of Virginia on direct appeal. *See Powell v. Warden of Sussex I State Prison,* No. 042716, 2005 WL 2980756, at *2 (Va. Nov. 8, 2005). Additionally, however, Powell also set forth several new claims. In relevant part, the new claims included: (i) challenges to the use of vileness and future dangerousness as aggravating factors during the sentencing phase, (ii) objections to the admission of a report containing false information about Powell's criminal history during the sentencing phase; (iii) a contention that Powell's statements to police after writing his letter to the Commonwealth's Attorney confessing to the attempted rape of Stacey were involuntary; (iv) a claim that Powell was administered an unusual combination of medications and was forced to wear a stun belt during his trial, both of which impaired his right to participate meaningfully in his trial; (v) a claim that trial counsel provided him ineffective assistance by failing to investigate and present a compelling mitigating case and failing to rebut the Commonwealth's aggravating evidence; and (vi) a contention that Virginia's post-conviction procedures are constitutionally inadequate. *Id.* at *2-*24. The

Supreme Court of Virginia denied relief on all grounds, but later granted rehearing on the question whether counsel was ineffective in the sentencing phase for failing to object to the introduction of the report containing false evidence of Powell's criminal history. Ultimately, the court, by a 4 to 3 vote, rejected this claim and denied Powell's petition for a new sentencing hearing. *Powell v. Warden of Sussex I State Prison,* 272 Va. 217, 634 S.E.2d 289 (2006).

Powell then filed this petition for a writ of habeas corpus under 28 U.S.C. § 2254,[3] in which he asserts nine main claims for relief:

1. that Powell's second capital murder trial violated the Double Jeopardy Clause;

2. that the trial court erred by limiting the scope of voir dire and by denying Powell's motion to strike the first venire panel for cause;

3. that the trial court erred by refusing to exclude or limit evidence of Powell's crimes against Kristie during the guilt phase of the trial;

4. that the Commonwealth violated Powell's constitutional rights by interrogating him and introducing his statements against him at trial;

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[3] Before filing this petition, Powell moved for the appointment of a "mitigation specialist," which this Court denied. *Powell v. Kelly*, No. 1:07cv57, 2007 WL 1856019, at *1 (E.D. Va. June 25, 2007) (Order).

5. that trial counsel rendered ineffective assistance by failing to investigate all reasonably available mitigating evidence;

6. that the security conditions imposed on Powell during trial unconstitutionally impeded his ability to participate meaningfully in his trial;

7. that the Commonwealth impermissibly introduced false evidence of Powell's criminal history;

8. that the jury unconstitutionally considered Virginia's vileness and future dangerousness aggravating factors in the sentencing phase; and

9. that Virginia's post-conviction review process is constitutionally infirm.

All of Powell's nine claims for relief have been exhausted as required by § 2254(b)(1), either because Powell actually raised each of them below, or because state avenues for relief are now closed to him. *See* Va. Code § 8.01-654.1.[4]

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[4] Claims not presented to the state court on appeal or during state habeas proceedings are nonetheless exhausted under the meaning of § 2254(b)(1) if "a state procedural rule would bar consideration if the claim was later presented to the state court." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997). Here, any of Powell's future claims in state court would be barred under Va. Code. § 8.01-654.1 (limiting state habeas review to petitions "filed within sixty days after ... denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on

II.

The federal habeas statute, bearing the eye-catching name the Antiterrorism and Effective Death Penalty Act (AEDPA),[5] sharply limits federal review of a petition for habeas corpus relief from a state conviction and sentence. It does so by dictating "a highly deferential standard for evaluating state-court rulings." *Bell v. Cone,* 543 U.S. 447, 455, 125 S. Ct. 847, 160 L. Ed. 2d 881 (2005) (internal quotation marks and citations omitted). Specifically, this deferential standard allows federal habeas relief only where one or both of the following conditions are met. First, federal habeas relief is proper if the state court's adjudication on the merits "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). It is now established that a state court decision is "contrary to" clearly established Supreme Court precedent if "the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases" or on facts "indistinguishable" from a Supreme Court decision, reaches a result different from the

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direct appeal") or § 8.01-654(B)(2) (stating that no "writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition"). *See Cardwell v. Netherland,* 971 F. Supp. 997, 1013 n.22 (E.D. Va. 1997); *see also Bassette v. Thompson,* 915 F.2d 932, 936-37 (4th Cir. 1990) (analyzing a different Virginia procedural statute, Va. Code § 8.01-654(B)(2), before the enactment of AEDPA).

[5] Pub. L. No. 104-132, 110 Stat. 1214 (1996).

Supreme Court precedent. *Williams v. Taylor,* 529 U.S. 362, 405-06, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000); *see also Lenz v. Washington,* 444 F.3d 295, 299-300 (4th Cir. 2006); *Lovitt v. True,* 403 F.3d 171, 178 (4th Cir. 2005). Also now settled is that a state court's decision involves an "unreasonable application" of federal law when that court identifies the proper governing federal rule from Supreme Court precedent, but then "unreasonably applies" that rule to a petitioner's case. *Rompilla v. Beard,* 545 U.S. 374, 380, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); *see also Booth-El v. Nuth,* 288 F.3d 571, 575 (4th Cir. 2002).

The second circumstance warranting federal habeas relief occurs where the state court's merits decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). And importantly, "a determination of a factual issue made by a State court shall be presumed to be correct" unless the habeas petitioner proves otherwise "by clear and convincing evidence." *Id.* § 2254(e)(1). This standard is plainly "demanding," but it is "not insatiable," as "[d]eference does not by definition preclude relief." *Miller-El v. Dretke,* 545 U.S. 231, 240, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005) (citing *Miller-El v. Cockrell,* 537 U.S. 322, 340, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003)).

These established principles are the lens through which Powell's § 2254 claims must be reviewed.

III.

Powell's central habeas claim is that the second trial violated his rights under the Double Jeopardy Clause.[6] He advances two principal arguments in support of this claim. First, he argues that the Double Jeopardy Clause was violated because the Commonwealth tried him twice under the same statute for the capital murder of Stacey and simply changed the identity of the victim of the rape or attempted rape in his second trial.[7] Alternatively, he argues that even if it was permissible to charge him with two separate counts of the capital murder of Stacey-one based on the attempted rape of Stacey and one based on the rape of Kristie-the Commonwealth actually tried him in both trials for the capital murder of Stacey during the commission of, or subsequent to, his rape or attempted rape of *Stacey*. The Supreme Court of Virginia rejected both arguments on direct appeal, for reasons that bear recounting, as these reasons must be the focus of the AEDPA review here.

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[6] The Double Jeopardy Clause provides that "[n]o person shall ... be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. It protects a defendant from being prosecuted a second time for the same offense after being acquitted of that offense; it also protects against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969).

[7] Under the Virginia capital murder statute, rape or attempted rape is considered a "gradation crime"-one that, when added to first degree murder, elevates the crime to capital murder. Thus, the "gradation crime victim" of Va. Code § 18.2-31(5) is the victim of the alleged rape or attempted rape, who may or may not be the murder victim.

The Supreme Court of Virginia disposed of Powell's first double jeopardy argument by ruling, in accord with its established precedent, that the General Assembly of Virginia plainly intended that a defendant may be prosecuted for multiple violations of the Virginia capital murder statute, where, as here, there is a single murder victim but different gradation crime victims. *See Powell,* 590 S.E.2d at 553 (citing *Payne v. Commonwealth,* 257 Va. 216, 509 S.E.2d 293, 301 (Va. 1999)). Thus, the Supreme Court of Virginia found that the capital murder of Stacey subsequent to Powell's attempted rape of Stacey was a distinct and separate crime from the capital murder of Stacey during the commission of, or subsequent to, Powell's rape of Kristie. The Supreme Court of Virginia then rejected Powell's second double jeopardy argument, relying on settled state precedent to rule that Stacey's attempted rape was not at issue in the first trial because the Commonwealth's bill of particulars limited that trial solely to the capital murder of Stacey subsequent to, or in the commission of, the rape of Kristie. *See Powell,* 590 S.E.2d at 552. The question presented, then, is whether the Supreme Court of Virginia's rejection of Powell's double jeopardy claim passes muster under AEDPA.

Analysis of Powell's first double jeopardy argument properly begins with identifying *Sanabria v. United States,* 437 U.S. 54, 70, 98 S. Ct. 2170, 57 L. Ed. 2d 43 (1978) as the controlling "clearly established federal law as determined by the Supreme Court of

the United States." 28 U.S.C. § 2254(d). There, the Supreme Court held that where a defendant is charged with several violations of the same criminal statute, the double jeopardy inquiry is whether the legislature responsible for passage of the statute intended the charged violations to be "allowable unit[s] of prosecution" separately chargeable under the statute. *Sanabria,* 437 U.S. at 70, 98 S. Ct. 2170. In other words, *Sanabria* stands for the proposition that where multiple violations of the same statute are charged, the question whether the violations are separate crimes for double jeopardy purposes requires ascertaining whether the legislature intended the violations to be separate crimes under the statute. *Id.*[8]

Applied here, *Sanabria* teaches that the pertinent

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[8] *Sanabria* followed previous Supreme Court precedent holding that when a defendant is charged with two violations of the same statute, the question is whether the legislature authorized two separately chargeable offenses or only one. *See Bell v. United States*, 349 U.S. 81, 82-83, 75 S. Ct. 620, 99 L. Ed. 905 (1955) (holding that absent clear Congressional intent, a defendant charged with transporting two women in interstate commerce at the same time could be charged with only one violation of the Mann Act, which criminalized transporting any woman in interstate commerce "for the purpose of prostitution or debauchery, or for any other immoral purpose") (quoting ch. 395, § 2, 36 Stat. 825, 825 (1910)). The primacy of legislative intent in this analysis is a reflection of the principle that "the Fifth Amendment double jeopardy guarantee serves principally as a restraint on courts and prosecutors" and that "[t]he legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments." *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 53 L. Ed. 2d 187 (1977).

double jeopardy question is whether the General Assembly of Virginia, in enacting Va. Code § 18.2-31(5), intended that murders with different gradation crime victims constitute separate and distinct crimes so that Powell's murder of Stacey subsequent to Powell's attempted rape of Stacey constituted a separate and distinct crime for double jeopardy purposes from Powell's murder of Stacey subsequent to Powell's rape of Kristie. The Supreme Court of Virginia, without citing *Sanabria,*[9] but engaging in the precise analysis required by that case, clearly answered this question in the affirmative: Consistent with the General Assembly's intent, Powell's two trials for capital murder were for separate and distinct crimes because different gradation crime victims were involved in each trial. It follows, therefore, that Powell's first argument fails, as it clearly appears that the Supreme Court of Virginia followed the appropriate Supreme Court precedent.

Nor is there any doubt that the Supreme Court of Virginia reasonably applied *Sanabria*. The Supreme Court of Virginia's legislative intent analysis was clear and explicit, covering both the language of Va. Code § 18.2-31(5) and the Supreme Court of Virginia's precedent construing this statute. Thus,

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[9] *See Early v. Packer*, 537 U.S. 3, 8, 123 S. Ct. 362, 154 L. Ed. 2d 263 (2002) (holding that to pass muster under the "contrary to" prong, a state court need not cite relevant Supreme Court precedent or even be aware of relevant cases, "so long as neither the reasoning nor the result of the state-court decision contradicts them").

the Supreme Court of Virginia noted that a defendant may be charged separately with both capital murder in the commission of robbery, Va. Code § 18.2-31(4), and with capital murder in the commission of rape, Va. Code § 18.2-31(5). *Powell,* 590 S.E.2d at 553 (citing *Payne,* 509 S.E.2d at 301). Next, the Supreme Court of Virginia noted that under its precedent, a defendant can be convicted of two charges of capital murder based on both attempted rape and object sexual penetration of the same victim, both defined as crimes under Va. Code § 18.2-31(5). *Id.* Given this, the Supreme Court of Virginia concluded that the Virginia General Assembly intended for a defendant to be chargeable with two counts of capital murder of the same victim under § 18.2-31(5) where, as here, there are different victims of "rape or attempted rape." *Powell,* 590 S.E.2d at 554. The Supreme Court of Virginia agreed with Powell that an indictment charging a single violation of § 18.2-31(5) without naming the victim of the rape or attempted rape would preclude future charges of capital murder of the same victim under that provision. The Supreme Court of Virginia then held that where the Commonwealth specifies the victim of the gradation offense, either in the indictment or in a bill of particulars submitted before jeopardy attaches, the crime becomes a "separate crime" for double jeopardy purposes. *Id.*[10]

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[10] *Cf. Martin v. Commonwealth,* 242 Va. 1, 406 S.E.2d 15, 18 (1991) (noting that "jeopardy attaches only after a jury is empaneled and sworn"); *Wade v. Commonwealth,* 9 Va. App. 359, 388 S.E.2d 277, 279 (Va. Ct. App. 1990) (stating that the "purpose of a bill of particulars is to clarify the basis upon

Thus, by carefully analyzing its precedent regarding the General Assembly's intended scope of the capital murder statute, the Supreme Court of Virginia applied the correct U.S. Supreme Court precedent. And importantly, there can be no second-guessing of the Supreme Court of Virginia's conclusion, as it is settled that "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey,* 546 U.S. 74, 76, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005) (per curiam) (citing *Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991)). Hence, under Virginia law, Powell was properly charged and tried on two separate counts of the capital murder of Stacey, one subsequent to his attempted rape of Stacey and one during the commission of, or subsequent to, his rape of Kristie.[11]

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which a charge is brought ... to enable [a defendant] to plead his acquittal or conviction in bar of any subsequent prosecution for the same offense").

[11] Indeed, Powell's counsel conceded these were two separate crimes during oral argument:

> THE COURT: "... [I]f there hadn't been a bill of particulars, would it have been permissible for the Commonwealth to have said in its indictment: There are two crimes here. One is killing Stacy [sic] while trying to rape-attempting to rape Stacy [sic], and number two, killing Stacy [sic] while attempting to rape Christie [sic]. Two different crimes."
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> ATTORNEY SHELDON: Your Honor, I think under Virginia-

Yet, this does not end the double jeopardy analysis, for Powell also argues that even if the General Assembly of Virginia intended the two crimes to be distinct, he was actually charged in both trials with the same crime, namely the capital murder of Stacey in the commission of, or subsequent to, his attempted rape of Stacey. The Supreme Court of Virginia rejected this argument on direct appeal, finding that although the first indictment did not allege a specific victim of rape or attempted rape, the bill of particulars served to narrow the offense and that Powell was therefore tried in the first trial only for the capital murder of Stacey during the commission of, or subsequent to, the rape of Kristie. *See Powell,* 590 S.E.2d at 552. In reaching this result, the Supreme Court of Virginia followed its well-established precedents holding that "the bill of particulars and the indictment must be read together" as specifying the crime charged. *Livingston v. Commonwealth,* 184 Va. 830, 36 S.E.2d 561, 565 (1946); *see also Wade v. Commonwealth,* 9 Va. App. 359, 388 S.E.2d 277, 279 (Va. Ct. App. 1990). Put differently, a bill of particulars in Virginia narrows an indictment such that once the Commonwealth has provided the defendant with a bill of particulars, it

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THE COURT: He could have been indicted for both, couldn't he?

ATTORNEY SHELDON: Yes, he could have.

Tr. at 6. Powell's counsel later sought to retract this concession in a subsequently-filed motion for summary judgment. *See* Mot. for Summ. Judg., at 2 n.2.

may not prove its case with facts outside the scope of the bill of particulars. *See Powell,* 590 S.E.2d at 552; *Webster v. Commonwealth,* 141 Va. 589, 127 S.E. 377, 378-79 (1925). Based on these established principles of Virginia law, the Supreme Court of Virginia found that the bill of particulars, provided by the Commonwealth at Powell's request in the first trial, precluded the prosecution, as a matter of law, from securing a capital conviction in that trial based on the attempted rape of Stacey. Citing this established law, the Supreme Court of Virginia ruled that Powell's second trial was not a double jeopardy violation because the indictment in the second trial charged a crime not charged in the first trial, namely the murder of Stacey subsequent to, or in the commission of, the attempt to rape Stacey.

Nor is it open to Powell to second-guess the role of a bill of particulars under Virginia law. *See Bradshaw,* 546 U.S. at 76, 126 S. Ct. 602. Nonetheless, he argues that the Supreme Court of Virginia's determination of this issue was "an unreasonable determination of the facts in light of the evidence presented." 28 U.S.C. § 2254(d)(2). Specifically, he claims the bill of particulars did not limit the jury because (i) the prosecutor argued during trial that Powell "wanted something more" from Stacey, (ii) other witnesses suggested that Stacey refused to have sex with Powell, and (iii) the jury was not told about the limitation in the bill of particulars. None of these arguments alter the fact that, as a matter of Virginia law, the bill of particulars limited the Commonwealth to proving the rape of Kristie as the

gradation offense of the capital murder charge. Thus, under settled Virginia law principles, Powell was not tried twice for the same crime; instead, he was tried twice, but each time for a different crime.

Seeking to avoid this result, Powell argues incorrectly that the Supreme Court's test from *Blockburger v. United States,* 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932), applies. *Blockburger* is inapposite; it applies in situations where a defendant is charged with two crimes under *two different* criminal statutes based on the same conduct, whereas Powell was charged with two distinct crimes under the same statute. In *Blockburger,* the Supreme Court held that "where the same act or transaction constitutes a violation of *two distinct statutory provisions,* the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." (emphasis added). This test does not apply, however, where, as here, a defendant is charged with two separate violations of the same statutory provision.[12] The soundness of this point is well-illustrated by a simple hypothetical in which a defendant is charged under the same statute with the murders of Victim A and Victim B. Under *Blockburger,* which looks only to the statutory elements of the indictments, these would be the same

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[12] *See, e.g., Sanabria,* 437 U.S. at 70 n.24, 98 S. Ct. 2170; *United States v. Weathers,* 493 F.3d 229, 234 (D.C. Cir. 2007); *United States v. Smith,* 424 F.3d 992, 1000 (9th Cir. 2005); *United States v. Chipps,* 410 F.3d 438, 447-48 (8th Cir. 2005); *United States v. Goodine,* 400 F.3d 202, 207-08 (4th Cir. 2005).

crimes in the abstract. Yet, it is clear that a defendant could be charged for the murder of both victims. *See Sanabria,* 437 U.S. at 70 n. 24, 98 S. Ct. 2170 (holding that the protection of the Double Jeopardy Clause does not preclude a defendant from being charged under a "statute[ ] defining as the criminal offense a discrete act, after a prior conviction or acquittal of a distinguishable discrete act that is a separate violation of the statute").

In sum, in each of his two trials Powell was charged with a separate and distinct crime under Virginia law. One crime required the proof of the murder of Stacey subsequent to, or in the commission of, the rape of Kristie, while the other required proof of the murder of Stacey subsequent to, or in the commission of, the attempted rape of Stacey. Powell has offered no reason to dispute the Supreme Court of Virginia's interpretation of legislative intent in this regard. Thus, the Supreme Court of Virginia's disposition of this issue was not contrary to, nor an unreasonable application of, U.S. Supreme Court precedent.[13]

IV.

Powell's next claim is that his Fifth Amendment due process right to a fair trial was violated during voir dire. The Supreme Court of Virginia rejected this

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[13] Powell also makes a collateral estoppel claim related to his Double Jeopardy claim. Because this claim was found procedurally barred during state habeas proceedings, it will be discussed with his other defaulted claims, infra Part VIII.A.

argument on direct appeal. To understand this claim and the Supreme Court of Virginia's reasons for rejecting it, some factual context is necessary.

As already noted, the second indictment against Powell was based in part on the letter he sent to the Commonwealth's Attorney following the successful appeal of his first conviction. Powell began this letter by stating that he had "already been indicted on first degree murder and the Va. Supreme Court said that I can't be charged with capital murder again." J.A. at 1076. Expecting the letter to be introduced in Powell's second trial, and wishing to minimize its impact, Powell's counsel made a tactical decision to bring Powell's first conviction and successful appeal to the jury's attention at the outset of the trial. Consistent with this tactical decision, Powell's counsel decided to refer to the prior trial in the course of the voir dire.

During voir dire, the venire was questioned in panels of five. The judge asked the first panel of five, *inter alia,* (i) whether they had prior knowledge of Powell or the current charges against him, (ii) whether they had biases for or against the death penalty, and (iii) whether there was any reason they could not serve as fair and impartial jurors in the case. After questioning by the judge, the Commonwealth's Attorney and the defense counsel were permitted to question the panels further. When Powell's counsel questioned the first panel, he told them that the evidence would show Powell "has already been tried and convicted of capital murder at one point, and

he's serving three life sentences for other crimes." J.A. at 419.[14] Then, when Powell's counsel began describing to the panel that "the Supreme Court of Virginia overturned the," the Commonwealth's Attorney immediately interrupted and objected on the ground that this might taint the jury under *Barker v. Commonwealth,* 230 Va. 370, 337 S.E.2d 729 (1985), which held that a person who has prior knowledge of an accused's previous conviction for the same offense cannot serve as a juror during retrial for that offense. *Powell,* 590 S.E.2d at 547. Powell's counsel responded that the defense believed evidence of Powell's prior conviction and successful appeal would arise during trial through the introduction of Powell's letters to the Commonwealth's Attorney, and they therefore had made a tactical decision to disclose the prior trial to potential jurors during voir dire, and to ask whether they could remain impartial in view of the prior conviction. The trial court sustained the Commonwealth's objection and precluded Powell's counsel from pursuing that line of questioning, but refused to dismiss the panel of potential jurors, relying instead on an instruction to the panel to disregard Powell's counsel's comment. *Id.*

On direct appeal, Powell argued that his right to a fair trial was violated by the trial court's refusal to allow this line of questioning, arguing that this

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[14] "J.A." refers to the Joint Appendix of Powell's direct appeal of his second conviction. "H.A.," cited elsewhere in this Memorandum Opinion, refers to the Appendix submitted with Powell's petition for state habeas corpus relief.

questioning fell within the ambit of Va. Code § 8.01-358, which states that either party has the right to question a prospective juror about "whether he is related to either party, or has any interests in the cause, or has expressed or formed any opinion or *is sensible of any bias or prejudice therein.*"[15] The Supreme Court of Virginia rejected Powell's claim, finding that Powell's question did not fall under Va. Code § 8.01-358 because rather than testing for bias, it simply "served to test the jurors' potential response to the evidence that he expected the Commonwealth to present." *Powell,* 590 S.E.2d at 559. The Supreme Court of Virginia further noted that the trial court has the sole discretion to allow voir dire on any matters outside the scope of Va. Code § 8.01-358. *Id.*

To begin with, Powell may not complain here that the Supreme Court of Virginia erred in its interpretation of Va. Code § 8.01-358, as it is settled that "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw,* 546 U.S. at 76, 126 S. Ct. 602.[16] Nor is there any merit in Powell's claim that

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[15] Va. Code § 8.01-358 (emphasis added); *see LeVasseur v. Commonwealth,* 225 Va. 564, 304 S.E.2d 644, 653 (1983) (holding that if a voir dire question "would necessarily disclose, or clearly lead to the disclosure of the statutory factors of relationship, interest, opinion, or prejudice, it must be permitted").

[16] *See also Thomas v. Davis,* 192 F.3d 445, 449 n.1 (4th Cir. 1999) (noting that a state's highest court "is, of course, the ultimate arbiter of that state's laws; a claim that it had simply

the Supreme Court of Virginia's decision violates due process. While Supreme Court precedent makes clear that a mandatory state law in some instances can create liberty interests protected under the Due Process Clause of the Fourteenth Amendment,[17] Powell has failed to show he was denied a mandatory right under Virginia law, and indeed the Supreme Court of Virginia concluded to the contrary.

Powell further argues that once the trial court refused to allow questioning about the effect of the prior trial, it further violated his right to a fair and impartial jury by refusing to strike the panel of potential jurors who were told about Powell's previous conviction. This claim is meritless. First, Powell cites no controlling U.S. Supreme Court precedent in support of his claim, but instead bases his claim solely on *Barker,* a Virginia case holding that "when a venireman knows of an accused's previous conviction of the same offense for which he is being retried, the venireman cannot qualify as a juror in the new trial." 337 S.E.2d at 733. Even assuming Powell's argument is correct, a state court's alleged misapplication of state law is not a ground for habeas relief under § 2254. *See Thomas,*

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misconstrued an act of the state legislature would not be cognizable on federal collateral review"); *Humphries v. Ozmint*, 397 F.3d 206, 226 (4th Cir. 2005) (stating that "an issue of state law ... is not cognizable on federal habeas review").

[17] *See Sandin v. Conner*, 515 U.S. 472, 483, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995); *Clemons v. Mississippi*, 494 U.S. 738, 746-47, 110 S. Ct. 1441, 108 L. Ed. 2d 725 (1990) (citing *Hicks v. Oklahoma*, 447 U.S. 343, 346-47, 100 S. Ct. 2227, 65 L. Ed. 2d 175 (1980)).

192 F.3d at 449 n.1. Moreover, *Barker* and the federal cases cited by Powell in support of his claim[18] are inapposite, as Powell was not being retried for the same offense in his second trial for which he was convicted in his first trial. *See* Part III, *supra.* Rather, as already clearly established, Powell's second trial was for a second crime, separate and distinct from the crime for which he was tried in his first trial.

Finally, it is important to note a further state law ground on which this claim founders. The Supreme Court of Virginia correctly found that Powell invited any error that may have been committed by the trial court in this regard. *See Powell,* 590 S.E.2d at 559-60. It was Powell who chose to disclose to the potential jurors that he had been previously convicted of capital murder. Hence, under the doctrine of "invited error," Powell may not contend that potential jurors were tainted by their knowledge of his prior conviction when he is the one who disclosed the prior conviction to them. *See Saunders v. Commonwealth,* 211 Va. 399, 177 S.E.2d 637, 638 (1970) (holding that a court will not "notice error which has been invited by the party seeking to take advantage thereof on appeal"); *see also United States v. Collins,* 372 F.3d 629, 635 (4th Cir. 2004) (noting that "a defendant in a criminal case cannot complain of error which he himself has invited"); *United States v. Thomas,* 77 Fed. Appx. 673, 675 (4th Cir. 2003)

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[18] *See Arthur v. Bordenkircher*, 715 F.2d 118, 120 (4th Cir. 1983); *United States v. Williams*, 568 F.2d 464, 471 (5th Cir. 1978).

(finding that a defendant who submitted voir dire questions to the court could not appeal his conviction on the ground that the court's use of that line of questioning was improper).

Accordingly, for all these reasons, Powell's claim for habeas relief arising from the voir dire process fails.

V.

In his next claim for relief, Powell alleges that the trial court erred in admitting evidence about Powell's rape and attempted murder of Kristie during the guilt determination phase of the trial. Powell points out, for example, that the Commonwealth presented extensive graphic testimony from Robert Culver, describing Kristie's appearance when he found her naked and bleeding after Powell raped and attempted to kill her. In addition, the detective who responded to the scene, Kristie's doctor, and Kristie all testified about Powell's attack on Kristie. Powell claims the evidence of these crimes was irrelevant to the crime charged in the second trial because these crimes took place after the attempted rape and murder of Stacey. Even if this evidence were relevant, Powell contends it should have been excluded as unfairly prejudicial.[19]

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[19] Powell also claims this evidence is best characterized as "victim impact" evidence, inadmissible during the guilt determination phase of trial. The Supreme Court of Virginia found this argument procedurally barred on direct appeal, as Powell failed to raise it at trial. *Powell*, 590 S.E.2d at 557 n.11. A federal habeas court may not, therefore, consider this argument under § 2254 unless there is cause and prejudice

The Supreme Court of Virginia found no error in the admission of this evidence, concluding instead that the evidence was admissible as "a common criminal scheme" under Virginia evidence laws. *Id.* at 557; *see also Tomlinson v. Commonwealth,* 8 Va. App. 218, 380 S.E.2d 26, 30 (Va. 1989) (holding that evidence of other crimes, though generally inadmissible to show character, is admissible to show, for instance, proof of motive or plan). Additionally, the Supreme Court of Virginia acknowledged that the evidence of Powell's crimes against Kristie was powerful, but noted that "the mere fact that such evidence is powerful because it accurately depicts the gravity and atrociousness of the crime or the callous nature of the defendant does not thereby render it inadmissible." *Powell,* 590 S.E.2d at 558. In other words, the Supreme Court of Virginia acknowledged that this evidence was damaging to Powell's defense, but concluded nonetheless that it was admissible under Virginia law as part of a "common criminal scheme." *Id.* at 557. Moreover, because there was evidence that "Powell went to the Reed home with the intention of raping and killing both Stacey and Kristie," the Supreme Court of Virginia found that evidence of the crimes against Kristie was "directly probative of [Powell's] motive and intent" in the crimes against Stacey. *Id.* at 558. Simply put, the Supreme Court of Virginia found that evidence of Powell's rape and attempted murder of Kristie,

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shown with respect to the default. *See Edwards v. Carpenter*, 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). Powell makes no such showing.

which took place immediately after the attempted rape and murder of Stacey, was relevant to show his intent with respect to Stacey. *Id.* The Supreme Court of Virginia also noted that Powell later explained that he intended to kill the entire family when he went to the Reed house, and that he had to kill Kristie in part because she was a witness to his crimes against Stacey. *Id.*

A decision to admit evidence under state law is not reviewable by a federal habeas court "unless erroneous evidentiary rulings were so extreme as to result in a denial of a constitutionally fair proceeding." *Burket v. Angelone,* 208 F.3d 172, 186 (4th Cir. 2000). The key inquiry is whether the error "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *See Darden v. Wainwright,* 477 U.S. 168, 181, 106 S. Ct. 2464, 91 L. Ed. 2d 144 (1986) (citing *Donnelly v. DeChristoforo,* 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974)).

Measured against this standard, Powell's claim fails. The admission of evidence of his crimes against Kristie had a legitimate purpose under state law and the fact that the evidence was potentially harmful to Powell does not render it unconstitutionally prejudicial.[20] As the Supreme Court of Virginia

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[20] Nor does Powell's cited authority support the result he seeks. Although the cases acknowledge the principle that erroneous admission of evidence can rise to a federal constitutional violation, not one of those cases found that an error of constitutional magnitude occurred. *See Estelle v. McGuire,* 502

reasonably found, such evidence was probative of Powell's motive and intent in killing Stacey, and the two events were part of the same criminal plan. This Supreme Court of Virginia finding does not contravene, or involve an unreasonable application of, federal law, nor is it based on an unreasonable determination of facts.

VI.

Powell's next claim stems from statements he made to police following his successful appeal from his first conviction. This appeal resulted in the vacation of his conviction for capital murder, as charged in the first indictment, and a remand limiting a retrial on the first indictment to no greater than first degree murder. Believing he could no longer be tried for capital murder, Powell wrote a letter to the Commonwealth's Attorney confessing to his crimes and admitting additional facts. Thereafter, police questioned Powell about this letter while he was

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U.S. 62, 70, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991) (declining to reach the question whether "it is a violation of the due process guaranteed by the Fourteenth Amendment for evidence that is not relevant to be received in a criminal trial"); *Payne v. Tennessee*, 501 U.S. 808, 825, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (recognizing that where "evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief," but finding no such unfairness in the present case); *Humphries v. Ozmint*, 397 F.3d 206, 217 (4th Cir. 2005) (same); *Burket*, 208 F.3d at 186 (same); *Turrentine v. Mullin*, 390 F.3d 1181, 1201 (10th Cir. 2004) (same); *Janecka v. Cockrell*, 301 F.3d 316, 328-29 (5th Cir. 2002) (same).

awaiting retrial on the charges in the first indictment. During this questioning, Powell authenticated his letter and made incriminating statements that were used against him in his second trial. *Powell,* 590 S.E.2d at 558. Powell claims the questioning violated his Sixth and Fourteenth Amendment right to counsel because it occurred while he was awaiting retrial for the murder of Stacey, a charge on which he was represented by counsel.[21]

In rejecting this claim on direct appeal, the Supreme Court of Virginia correctly noted that the Sixth Amendment right to counsel is offense-specific. *See Powell,* 590 S.E.2d at 558; *see also McNeil v. Wisconsin,* 501 U.S. 171, 175, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991). It then noted that, based on its double jeopardy ruling, the crime about which Powell was questioned, namely the murder of Stacey subsequent to, or in the commission of, the attempted rape of Stacey, was "a separate offense from those for which he had been previously convicted." *Powell,* 590 S.E.2d at 558. Because the challenged interrogation concerned a new crime for which Powell had not been previously charged, the Supreme Court of Virginia held that Powell's Sixth Amendment right to counsel had not yet attached to that new crime. *Id.*

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[21] Powell also makes two closely related claims concerning this questioning. Because these claims were found procedurally defaulted by the Supreme Court of Virginia, they are discussed *infra* Part VIII.B.

This finding is neither contrary to, nor or an unreasonable application of, clearly established Supreme Court precedent. It is well-established that a defendant's Sixth Amendment right to counsel is offense-specific. *McNeil,* 501 U.S. at 175, 111 S. Ct. 2204. It is also clear that, according to the Supreme Court of Virginia's reasonable application of U.S. Supreme Court double jeopardy precedent, the crime charged in Powell's second trial was an offense separately chargeable from the crimes charged in his first trial. Thus, under Virginia law, the two capital crimes were separate offenses, and Powell's Sixth Amendment right had attached only to the capital crime charged in the first trial. Therefore, Powell's Sixth Amendment rights were not violated when he was interrogated about the new crime.

Nor can Powell escape this conclusion by arguing, as he does, that he was effectively charged with first degree murder when the Supreme Court of Virginia vacated his capital murder conviction and remanded with the instruction that Powell could be charged with no greater than first degree murder. *See Powell,* 590 S.E.2d at 545. Powell is correct that, had he been charged with first degree murder, his Sixth Amendment right to counsel would have attached both to that charge and to the charge of capital murder, as first degree murder is a lesser-included offense of capital murder. *See Hudson v. Commonwealth,* 267 Va. 36, 591 S.E.2d 679, 680 (2004). Yet, Powell was never charged with first degree murder. Although the Supreme Court of Virginia held that Powell could be charged with no

more than first degree murder on remand, it did not, nor could it have, formally charged Powell with first degree murder. Thus, in the first indictment, as modified by the bill of particulars, Powell had only been charged with the capital murder of Stacey subsequent to, or in the commission of, the rape of Kristie. His Sixth Amendment right to counsel had therefore attached only to that crime (and to lesser included offenses), but had not attached to the separate and distinct crime of the capital murder of Stacey subsequent to, or in the commission of, the attempted rape of Stacey. Hence, Powell's claim that the post-remand questioning violated his right to counsel must fail.

VII.

Next, Powell claims that trial counsel provided ineffective assistance during the sentencing phase of his trial by failing to investigate all reasonably available mitigating evidence. More specifically, he argues that a more thorough investigation would have uncovered evidence: (i) to rebut the Commonwealth's claim that Powell was racist and tortured animals; (ii) to rebut the Commonwealth's claim that Powell had no remorse for his crime against Stacey; (iii) to rebut the Commonwealth's claim that Powell had an above-average intelligence; (iv) to support a compelling mitigating case; and (v) to rebut the Commonwealth's use of Powell's letters to the Commonwealth's Attorney and Stacey's mother. The Supreme Court of Virginia rejected Powell's ineffectiveness claim, applying the U.S.

Supreme Court's well-known test from *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

It is well-settled that an individual claiming ineffective assistance of counsel must show, first, that counsel's performance was deficient, in that it "fell below an objective standard of reasonableness." *Id.* at 687-88, 104 S. Ct. 2052. The Supreme Court has noted that this is a deferential standard. Once counsel makes a reasonable investigation of law and facts in a particular case, his strategic decisions are "virtually unchallengeable." *Id.* at 690, 104 S. Ct. 2052. There is, of course, a distinction between a tactical or reasonable professional judgment to limit an investigation and a failure to do so as a result of inattention or indolence. The former is appropriately assessed under the deferential standard, while the latter constitutes ineffective assistance of counsel provided the requisite prejudice resulted. *Id.* at 691, 104 S. Ct. 2052; *see also Wiggins v. Smith,* 539 U.S. 510, 526, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (distinguishing between failure to investigate stemming from "inattention" and a decision not to investigate based on "reasoned strategic judgment"). Thus, when the claim is that counsel failed to present a sufficient mitigating case during sentencing, the inquiry "is not whether counsel should have presented a mitigation case" but "whether the investigation supporting counsel's decision not to introduce mitigating evidence ... *was itself reasonable.*" *See Wiggins,* 539 U.S. at 523, 123 S. Ct. 2527 (emphasis in original). Under the second

prong of *Strickland,* a court finding a deficient performance by counsel may not set aside a conviction unless the defendant can demonstrate prejudice.[22] This requires a defendant to show by "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694, 104 S. Ct. 2052. If the deficient performance occurred during sentencing that resulted in the imposition of the death penalty, a petitioner must show that "absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695.

Because the Supreme Court of Virginia applied *Strickland* in rejecting Powell's ineffectiveness claim, its decision was not "contrary to" clearly established federal law. Thus, review here is limited to whether the Supreme Court of Virginia applied *Strickland* unreasonably or made an unreasonable determination of the facts in light of the evidence presented. *See* § 2254(d)(1) & (2); *see also Bell v. Cone,* 535 U.S. 685, 699, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (holding that, to prevail under § 2254, a petitioner "must show that the [state court] applied *Strickland* to the facts of his case in an objectively unreasonable manner").

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[22] It should be noted that the "performance" prong need not be analyzed before the "prejudice" prong; if it is clear that an ineffectiveness claim is meritless because of lack of prejudice, there then is no need to analyze the performance prong. *Id.* at 697, 104 S. Ct. 2052.

A.

Powell first alleges that a more thorough investigation would have disclosed evidence to rebut the Commonwealth's evidence that Powell was racist and tortured animals. In this regard, it is worth recounting that Powell himself was the source of this evidence, as Powell admitted to police that he was racist and tortured animals. *See Powell,* 2005 WL 2980756, at *18. More specifically, Powell told police that he disapproved of Stacey's interracial relationship, and a paper found in his cell was covered with racial and ethnic slurs. He also told detectives that he "blew up [cats] with firecrackers" and would beat and kick them until they died. J.A. at 891. Indeed, affidavits supplied by Powell himself in support of his claim for state habeas relief supported the idea that he regularly made racist comments and told stories about torturing animals. *Powell,* 2005 WL 2980756, at *18.[23]

Despite this evidence, Powell now claims that he only made racist comments for their "shock value" and "wore racism like fashionable clothing" to impress certain groups of people. *See* Pet. at 62-63. To support his claim, Powell points to affidavits stating that Powell had lived, without incident, in a halfway house in which seventy-five percent of the occupants were black. He submitted an affidavit

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[23] For example, a middle-school classmate of Powell's stated that Powell told stories about torturing animals. H.A. at 2781. Powell's cousin and three of his close friends all stated that Powell made racist comments. H.A. at 2787, 2806, 2810, 2828.

from his cousin, who stated that Powell was not aggressive toward her when she dated a black man. Powell claims a more thorough investigation by counsel also would have shown that Powell was observed sharing a cigarette with a black man in front of his apartment and had lived with another black man for a short period of time. Finally, Powell claims that a reasonable investigation would have uncovered evidence to rebut the Commonwealth's assertion that he tortured animals. He points to affidavits from friends and family members who stated that Powell was always kind to their pets. Some of his friends stated that they did not believe Powell's stories about torturing animals.

In applying *Strickland,* the Supreme Court of Virginia found neither deficient performance nor the requisite prejudice. *Powell,* 2005 WL 2980756, at *18. In light of Powell's own numerous statements to the contrary, the Supreme Court of Virginia correctly held that Powell's trial counsel's performance was not deficient in choosing not to investigate whether Powell meant what he said about these aspects of his character. *See id.* This analysis was not an unreasonable application of *Strickland,* which does not require trial counsel to investigate every possible aspect of his or her client's personality and background. *See Rompilla v. Beard,* 545 U.S. 374, 383, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (noting that "the duty to investigate does not force defense lawyers to scour the globe on the off-chance something will turn up"). Indeed, if, after speaking with the client, counsel determines that a particular

type of "evidence would be of little help," he is not deficient in failing to investigate further. *Strickland,* 466 U.S. at 699, 104 S. Ct. 2052.[24] Because Powell's trial counsel had numerous statements from *Powell himself* bragging about his racist beliefs and animal torture, it was not unreasonable for the Supreme Court of Virginia to conclude that counsel was not deficient for failing to investigate these characteristics further.

Nor can Powell demonstrate prejudice from the failure to introduce this evidence. Even if Powell's proffered evidence had been introduced, the jury would have had to weigh it against Powell's own racist comments and stories of animal torture. In short, the mitigating evidence of Powell's tolerance of others and kindness to animals would have had to outweigh Powell's own statements to the contrary. Thus, to affect the outcome of Powell's sentence, Powell essentially would have had to convince a jury that he lied about being a racist and torturing

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[24] The Supreme Court's decision in *Rompilla* is distinguishable. In *Rompilla*, the Court held that "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." 545 U.S. at 377, 125 S. Ct. 2456. Here, Powell does not allege, nor is there any indication, that counsel failed to review the aggravating evidence likely to be presented by the Commonwealth. Nor does Powell assert that counsel relied on assurances from Powell that there was no mitigating evidence available in deciding not to pursue this particular mitigation strategy. Hence, *Rompilla* is inapposite in this regard.

animals. Because Powell's proffered evidence simply does not outweigh the overwhelming aggravating evidence presented, Powell has not shown that he was prejudiced by counsel's performance. *See Wiggins,* 539 U.S. at 534-35, 123 S. Ct. 2527 (finding that, when assessing prejudice under *Strickland,* a court should "reweigh the evidence in aggravation against the totality of the mitigating evidence").

B.

Powell next claims counsel was ineffective in failing to discover evidence to rebut the Commonwealth's claim that Powell lacked remorse for his crime. Powell points to affidavits of his probation officer, a nurse at his prison facility, and a police officer, all of whom said that Powell had expressed remorse to them. Powell also claims that counsel should have introduced during sentencing the fact that Powell cried when the tape of the 911 call about Kristie was played during his first trial.

The Supreme Court of Virginia found no deficient performance nor prejudice under *Strickland. Powell,* 2005 WL 2980756, at *19. Instead, the Supreme Court of Virginia found "that there was overwhelming evidence that petitioner lacked remorse." *Id.* For instance, in his letter to the Commonwealth's Attorney after his successful appeal, Powell bragged about his crime and admitted that after killing Stacey, he had smoked a cigarette and enjoyed a glass of iced tea. At no point in the letter did Powell express remorse. *Id.* Powell also

stated that he wanted Stacey's parents to "relive it all over again because if I have to suffer for the next 50 or 60 years or however long then they can suffer the torment of reliving what happened." *Id.* In the letter to Stacey's mother in which Powell enclosed a nude photograph resembling Stacey, he expressed no remorse for his crime. *Id.* In the face of such overwhelming evidence to the contrary, the Supreme Court of Virginia found that it was not deficient performance for counsel to fail to investigate whether Powell was remorseful. *Id.* Furthermore, the Supreme Court of Virginia found that Powell failed to show that if evidence of his remorse had been presented, "the result of the proceeding would have been different." *Id.*

While the decision not to introduce evidence of Powell's remorse is questionable, there is no showing that counsel's performance was objectively unreasonable. As with the evidence about Powell's racist beliefs and animal torture, the evidence of Powell's lack of remorse for his crime was overwhelming. Indeed, Powell's second trial came about solely because of the letter he wrote, bragging about his crimes against Stacey and taunting the Commonwealth's Attorney. In the face of such evidence, it is not objectively unreasonable for trial counsel to have decided not to "scour the globe" for evidence of Powell's remorse. *See Rompilla,* 545 U.S. at 383, 125 S. Ct. 2456.

Yet, even assuming counsel's performance in this regard was deficient, Powell has not demonstrated

that the evidence he mentions would have affected the outcome of his sentence. Rather, where there are "overwhelming aggravating factors," a court may find that omitted evidence would have had no reasonable probability of affecting the sentence. *See Strickland,* 466 U.S. at 699, 104 S. Ct. 2052. Because the evidence overwhelmingly showed that Powell had no remorse for his crimes, he has not shown that but for counsel's failure to present the evidence of remorse he now adduces, the jury would not have sentenced him to death.

C.

Powell next claims that trial counsel was ineffective in failing to present evidence to rebut the Commonwealth's claim that Powell was of above-average intelligence. The Commonwealth's Attorney noted at sentencing that Powell was "no dummy. He's got an above average-at least average intelligence." J.A. at 1031.[25] Powell's experts at trial and the evidence he now offers suggest that he was "average or below," or "within the average range of intelligence," and was "capable of functioning in the average range despite low average range IQ scores." *Powell,* 2005 WL 2980756, at *19. Because the evidence Powell supported, rather than refuted, that Powell falls within the average range of intelligence, the Supreme Court of Virginia found no deficient

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[25] Powell does not cite the record in making this claim, but after thoroughly reviewing the record, it appears this closing argument statement is the only suggestion made by the Commonwealth that Powell was of above-average intelligence.

performance by counsel.

This was not an unreasonable application of *Strickland.* None of the evidence on which Powell relied during his state habeas proceedings, nor any of the evidence he now cites, supports Powell's claim that he is of below-average intelligence. At most, the record evidence is that Powell falls on the low side of the average range of intelligence. Indeed, Powell's own counsel presented expert testimony that Powell fell within an average range of intelligence. As a result, there was simply no deficient performance in failing to present this mental intelligence evidence, and there is no plausible argument that Powell suffered any prejudice. Therefore, Powell's claim in this regard fails.

D.

Next, Powell claims that trial counsel's performance was deficient because it failed to discover evidence to support a "compelling mitigation case." He claims that counsel presented "less than two hours of weak testimonial evidence" and no documentary evidence. Pet. at 65. Furthermore, Powell states that his mother was ill-prepared by counsel for her testimony and that counsel met with his brother, Matthew, for only ten minutes shortly before the trial. *Id.* Finally, Powell points to an affidavit by Dr. Stejskal, the psychologist who testified on his behalf, stating that Dr. Stejskal testified concerning only ten percent of his findings and was "very surprised" that counsel limited his testimony. *Id.* Dr. Stejskal said that he

felt that counsel "had done Mr. Powell a disservice" by "deviat[ing] from the planned presentation of the mitigation evidence." *Id.* at 65-66.More specifically, Powell alleges that evidence was readily available to show that he: (i) had a "toxic" home life and adolescence; (ii) had a history of mental problems; (iii) faced many obstacles to getting his problems treated; (iv) was homeless shortly before committing his crimes; and (v) showed no signs of future dangerousness while in prison.

First, Powell claims counsel was ineffective in failing to discover evidence that Powell had a "toxic" home life and adolescence. He points to numerous documents outlining that both Powell and his brother were physically and emotionally abused by their father, including a 1991 family assessment completed by a psychiatric facility, reports from a probation officer, and a 1993 mental health report. He also points to a report by a guardian ad litem recommending that Powell be removed from his home. Other evidence includes the fact that Powell was sexually assaulted at age 17.

The Supreme Court of Virginia rejected this claim, finding no deficient performance under *Strickland* because counsel did investigate Powell's home life and did present evidence of this during the sentencing phase. Specifically, counsel presented testimony from multiple witnesses regarding Powell's "toxic home life," including Powell's brother, mother, and father. *Powell,* 2005 WL 2980756, at *21. This evidence included testimony regarding the

abuse Powell sustained at the hand of his father. Dr. Stejskal, Powell's expert, also testified about Powell's difficult upbringing and home life, specifically noting that his home environment was "toxic." *Id.* The Supreme Court of Virginia also found that Powell was not prejudiced by counsel's performance in this regard. It held that, to the extent any additional information may have been presented on this point, it would either be cumulative or not helpful and would not have changed the outcome of Powell's death sentence. *Id.* Because most of the evidence to which Powell points was presented in some form during sentencing, and because he has offered no reason to believe cumulative evidence on this point would have affected the outcome of his sentence, the Supreme Court of Virginia's disposition of this ineffectiveness claim is not an unreasonable application of *Strickland.*

Powell also asserts that trial counsel was ineffective in failing to investigate Powell's mental health problems. He cites psychological evaluations from 1991, 1993, and 1995, and reports from Prince William County Schools and the Manassas Public Schools in support of his claim. The Supreme Court of Virginia found that counsel's performance was not deficient in this regard, noting that in preparation for each of Powell's trials, Dr. Stejskal, Powell's appointed mitigation expert, reviewed all of Powell's mental health reports, including those Powell now cites. *Id.* The Supreme Court of Virginia also noted that Dr. Stejskal, in turn, based his evaluation of Powell's mental health on those reports and his own

meetings with Powell. *Id.* Given this, the Supreme Court of Virginia found that trial counsel was not deficient in relying on the expert's distillation of Powell's mental health history. *Id.*

This analysis was not an unreasonable application of *Strickland.* The evidence to which Powell now cites was part of counsel's investigation, as it was used by Powell's expert in presenting a case about Powell's mental health history. Counsel's strategic decision to rely on one expert to cover all of Powell's mental health history was not objectively unreasonable. Nor was there any prejudice from counsel's decision not to offer the mental health reports themselves into evidence, as the mitigation testimony clearly outlined Powell's visits to mental health facilities, the fact that he engaged in self-mutilation and had suicidal tendencies, and doctors' multiple attempts to find a medication to help Powell. In short, Powell does not contend that no mental health evidence was presented; rather, he claims counsel should have presented this evidence in greater detail or in documentary form. This claim falls far short of showing deficient performance or prejudice under *Strickland;* Powell's counsel presented substantial mitigation testimony regarding Powell's mental health. In sum, Powell has not demonstrated that the mitigation evidence to which he points, which is cumulative of the evidence presented, would have changed the outcome of his sentence. Thus, the Supreme Court's application of *Strickland* in this regard was not unreasonable.

Next, Powell claims counsel was ineffective in failing to present mitigating evidence concerning the obstacles Powell faced in receiving treatment for his mental health problems. These obstacles included the fact that Powell's father refused to allow Powell back into the house after he received treatment in a psychiatric facility and refused to attend court-ordered family counseling. Powell also notes that while one round of counseling was productive for him, it was cut short because of budgetary and staffing concerns.

The Supreme Court of Virginia reasonably rejected the ineffectiveness claim, finding neither prong of *Strickland* satisfied. *Id.* at *22. It held, and the record supports, that the jury did in fact hear all of the evidence to which Powell now points. *Id.* Counsel presented evidence that Powell's father refused to participate in family counseling. Moreover, the jury heard evidence that Powell did not complete some of his treatments and never received others that were suggested for him. As the Supreme Court of Virginia reasonably found, the evidence Powell now cites would be cumulative of evidence already presented to the jury. *Id.* As such, counsel's choice not to offer more of the same evidence did not constitute deficient performance; nor can Powell show that additional evidence on these points would have affected the outcome of his sentence. Therefore, it was not unreasonable or contrary to *Strickland* for the Supreme Court of Virginia to reject this claim.

Next, Powell argues that counsel was ineffective in

failing to present evidence of Powell's homeless life prior to killing Stacey. Powell notes that he was homeless during this time, alternately living in his car and on friends' couches. Powell's aunt refused to allow Powell to live with her, and Powell's mother and brother refused to allow Powell in the house even to shower. Powell also states that, during this period of his life, he "lost friends because he was clingy, acted weird, and jealous" of other men who dated Stacey. Pet. at 75. Finally, Powell notes that he was drinking almost a case of beer a day when he committed his crimes against Stacey and Kristie.

The Supreme Court of Virginia rejected this ineffectiveness claim, finding that Powell was homeless "because his family was either afraid he would steal from them or because the children in the home were frightened of him" and that Powell's friends found him "weird" and "clingy." *Powell,* 2005 WL 2980756, at *22. The Supreme Court of Virginia further found that Powell's counsel made a strategic decision not to call Powell's family and friends for these points, as this evidence could be seen as aggravating, not mitigating evidence. *Id.* (citing *Barnes v. Thompson,* 58 F.3d 971, 980-81 (4th Cir. 1995) (finding reasonable counsel's decision not to introduce evidence that "would have been counterproductive")). This was not an unreasonable application of *Strickland,* which dictates that the Sixth Amendment was not designed to allow a court to second-guess strategic decisions by counsel. *See Bell v. Cone,* 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (noting that "a court must

indulge a 'strong presumption' that counsel's conduct falls within the wide range of reasonable professional assistance because it is all too easy to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight").

Finally, Powell claims that his trial counsel should have presented evidence that Powell lacked future dangerousness if imprisoned for life. He cites reports that he responded well to his school's structural environment and to his stay in a juvenile detention home. He also notes that he earned a G.E.D. while incarcerated in 1995 and was released from parole in 1997. Powell also points to the fact that he had no recorded disciplinary infractions while incarcerated for his crimes against Stacey and Kristie.

The Supreme Court of Virginia found no deficient performance by trial counsel on this count, noting that counsel presented the testimony of Dr. Stejskal, who explained that Powell had no disciplinary infractions while in prison and was responding well to medication and psychiatric care. *Powell,* 2005 WL 2980756, at *23. The Supreme Court of Virginia also found that even if trial counsel had presented all of the evidence which Powell now cites, no prejudice could be shown in light of the "overwhelming" evidence of Powell's future dangerousness presented by the Commonwealth. *Id.* Evidence of future dangerousness included Powell's own racist statements that "everybody that ain't white ... needs to die" and that if he had had a gun, he would "kill[ ] a lot of somebodies." *Id.* Powell also wrote a letter to

a friend, asking that "somebody go to a pay phone and call Kristie and tell her she better tell the cops that she lied to them and tell her she better not testify against me or she's gonna die." J.A. at 1217.

The Supreme Court of Virginia's application of *Strickland* to this claim was not objectively unreasonable. Because Powell's counsel presented some of the evidence rebutting Powell's future dangerousness, and because the aggravating evidence on this point was overwhelming, it was not unreasonable for the Supreme Court of Virginia to conclude that Powell's ineffectiveness claim on this ground was without merit. *See Strickland,* 466 U.S. at 699, 104 S. Ct. 2052.

E.

Finally, Powell argues that counsel provided him ineffective assistance during the sentencing phase of his trial by failing to investigate evidence to rebut the force of the letters he wrote to the Commonwealth's Attorney and to Stacey's mother. Powell claims he has a history of "self-destructive behavior" during times of "heightened stress," and that his letters demonstrate neither pride nor lack of remorse for his crimes, but rather are evidence of his mental health problems. Pet. at 77. Because Powell did not assert this claim at any point during state proceedings, it is simultaneously exhausted and defaulted. *See Matthews v. Evatt,* 105 F.3d 907, 911 (4th Cir. 1997) (stating that "the exhaustion requirement is technically met when ... a state

procedural rule would bar consideration if the claim was later presented to the state court"); *see also Gray v. Netherland,* 518 U.S. 152, 162, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996) (noting that the "failure to raise [a claim] in state court implicates the requirements in habeas of exhaustion and procedural default"). It is exhausted because, under Va. Code § 8.01-654(b)(2), Powell is barred from bringing a successive habeas petition "on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petitions."[26] Because this state procedural rule provides an adequate and independent ground for denying relief on this claim, a federal habeas court may not consider it unless Powell alleges cause and prejudice for the default. *See Gray,* 518 U.S. at 162, 116 S. Ct. 2074 (citing *Teague v. Lane,* 489 U.S. 288, 298, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)). Powell has alleged no cause for the default, and hence the merits of this ineffectiveness claim may not be reviewed here.

VIII.

The remainder of Powell's claims were not considered by the Supreme Court of Virginia on direct appeal and were therefore found procedurally

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[26] It is also barred under Va. Code § 8.01-654.1, which states that "[n]o petition for a writ of habeas corpus ... shall be considered unless it is filed within sixty days after the earliest of: (i) denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal."

defaulted during state habeas proceedings under the rule set forth in *Slayton v. Parrigan,* 215 Va. 27, 205 S.E.2d 680, 682 (1974), namely holding that the Supreme Court of Virginia may not entertain a claim during state habeas proceedings that was not raised at trial or on direct appeal. Because this state procedural rule supplies an adequate and independent ground for denial of a claim for habeas relief, a federal habeas court may not review defaulted claims absent "cause and prejudice" for the default. *Edwards v. Carpenter,* 529 U.S. 446, 451, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000). In some circumstances, ineffective assistance of counsel may be sufficient "cause" for a defaulted claim. *See Edwards,* 529 U.S. at 451, 120 S. Ct. 1587; *Slavek v. Hinkle,* 359 F. Supp. 2d 473, 480 (E.D. Va. 2005). Importantly, where a petitioner for federal habeas relief seeks review of claims defaulted during state habeas proceedings, he must show that he raised the ineffectiveness argument as a cause for the defaulted substantive claims during his state habeas proceedings. If a petitioner did not raise the ineffectiveness claim at the state habeas level, a federal habeas court may not consider it. *Edwards,* 529 U.S. at 452-53, 120 S. Ct. 1587.

Where, as here, a petitioner raised an ineffectiveness claim as cause for default in state court, the question arises whether a federal habeas court should review the state court's resolution of that claim *de novo* or deferentially under § 2254(d). Put differently, the question is whether "the same claim of ineffective assistance of counsel get[s] reviewed differently

when presented merely as cause for a procedural default as opposed to being presented in a petition as the basis in the first instance for habeas relief." *Lee v. Davis,* 328 F.3d 896, 901 (7th Cir. 2003).

This question is unresolved in this circuit,[27] and the handful of courts to have considered the issue have reached differing results. The Third and Sixth Circuits, for instance, have held that a federal habeas court must review *de novo* a petitioner's claim of ineffective assistance of counsel as cause for default of another claim.[28] The opposing view holds

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[27] The Fourth Circuit expressly refrained from ruling on the issue. *See Orbe v. True*, 82 Fed. Appx. 802, 808 (4th Cir. 2003) (finding it "unnecessary to resolve" whether federal review of an ineffectiveness claim as cause for procedural default is de novo or is subject to § 2254). The Seventh Circuit has likewise explicitly refrained from deciding this "preliminary puzzle." *Lee*, 328 F.3d at 901 (finding that "regardless whether we review Lee's ineffective assistance claim de novo or deferentially, our answer is still the same: there was no ineffective assistance of appellate counsel because Lee cannot show prejudice").

[28] *See Joseph v. Coyle*, 469 F.3d 441, 459 (6th Cir. 2006) (stating that while a habeas petitioner "must satisfy the AEDPA standard with respect to his independent IAC claim, he need not do so to claim ineffective assistance for the purpose of establishing cause" for defaulting another claim); *Fischetti v. Johnson*, 384 F.3d 140, 154-55 (3d Cir. 2004) (same); *see also Holloway v. Horn*, 161 F. Supp. 2d 452, 478 n.12 (E.D. Pa. 2001) (same), *rev'd on other grounds by* 355 F.3d 707 (3d Cir. 2004); *Holland v. Horn*, 150 F. Supp. 2d 706, 747 (E.D. Pa. 2001) (same); *Torrefranca v. Schriro*, No. Civ-05-2909, 2006 WL 1981788, at *10 n.5 (D. Ariz. July 13, 2006) (same). Additionally, one court in this district has adopted the reasoning of the Sixth and Third Circuits. *Green v. Johnson*, 2007 WL 951686, at *3 (E.D. Va. Mar. 26, 2007).

that AEDPA's deferential standard applies.[29] Resolution of this review standard question turns on the language of § 2254(d), which states that "a writ of habeas corpus ... shall not be granted with respect to any *claim* that was adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d) (emphasis added). Those courts holding that a *de novo* review applies have interpreted "claim" to apply only to the underlying defaulted claim, and not to the issue of cause for defaulting that claim.[30] The contrary view is that § 2254(d)'s deferential standard of review also applies to a claim of ineffective assistance of counsel asserted as cause for a procedurally defaulted claim because *Edwards* requires that an ineffectiveness claim as cause for default "must be presented to the state courts as an independent claim before it may be used to establish cause for a procedural default." *Edwards,* 529 U.S. at 452, 120 S. Ct. 1587. Thus, because *Edwards* makes clear that "ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim" that must have been presented to the state court, there is strong reason to believe that the state court's resolution of that ineffectiveness claim is subject to the same § 2254 principles as an ineffectiveness claim presented as a

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[29] *See Orbe v. True*, 233 F. Supp. 2d 749, 758 (E.D. Va. 2002).

[30] *See, e.g., Fischetti*, 384 F.3d at 154-55 (holding that "AEDPA does not establish a statutory high hurdle for cause"); *Holloway*, 161 F. Supp. 2d at 476 n.12 (stating that "[c]ause and prejudice are merely an excuse to overcome a procedural default; they are not a claim in themselves").

separate, substantive claim for habeas relief. *See id.* at 451, 120 S. Ct. 1587 (emphasis in original).[31]

In any event, whatever significance this dispute concerning the proper federal review standard may have in some close cases,[32] it is academic here given that Powell's ineffectiveness claim asserted as cause for default fails under both the *de novo* review standard and the § 2254(d) deferential standard. In other words, whether review here is deferential or *de novo,* Powell's ineffectiveness claim fails and his defaulted claims cannot be considered.

A.

Powell's first procedurally defaulted claim is based on the doctrine of collateral estoppel. He argues that even if his double jeopardy claim fails because he was not charged in his first trial with killing Stacey

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[31] Indeed, the Supreme Court's decision in Edwards rested on principles of comity and federalism in requiring a habeas petitioner to present an ineffectiveness claim as cause for default in state court. *See id.* at 451, 120 S. Ct. 1587 (citing *Coleman v. Thompson*, 501 U.S. 722, 730, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991); *Murray v. Carrier*, 477 U.S. 478, 490-92, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986)). Those same principles support applying § 2254's deferential review standard to the state court's resolution of an ineffectiveness claim asserted as an excuse for defaulting a claim.

[32] For example, the standard applied might affect the outcome of a case where a federal habeas court disagrees with the state court's resolution of an ineffectiveness claim under *Strickland*, but where the state court's analysis was not so unreasonable as to be an "unreasonable application" of federal law under § 2254(d).

in the commission of, or subsequent to, attempting to rape her, the doctrine of collateral estoppel nonetheless barred relitigation of the *factual* issue of his attempted rape of Stacey. Put differently, Powell contends that, even assuming his attempted rape of Stacey could not have been a basis for a capital murder conviction under Va. Code § 18.2-31(5) in his first trial, the prosecution's presentation of evidence on this matter during Powell's first trial precluded the relitigation of Powell's attempted rape of Stacey during the second trial.

The Supreme Court of Virginia found this claim procedurally barred during state habeas proceedings under *Slayton* because it had not been raised during trial or on direct appeal. *Powell,* 2005 WL 2980756, at *4. It rejected Powell's ineffectiveness claim as cause for the default on the ground that counsel's conduct failed to meet *Strickland's* "prejudice" prong; the court found that if Powell's counsel had raised the collateral estoppel argument on direct appeal, it would not have affected the outcome of his case. *See Powell,* 2005 WL 2980756, at *5.

U.S. Supreme Court precedent makes clear that collateral estoppel applies "when an issue of ultimate fact has once been determined by a valid and final judgment." *Ashe v. Swenson,* 397 U.S. 436, 443, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). If a court determines that "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," then collateral estoppel does not bar the issue from

being relitigated in a subsequent trial between the same parties. *Id.* at 444, 90 S. Ct. 1189 (quoting *Sealfon v. United States,* 332 U.S. 575, 579, 68 S. Ct. 237, 92 L. Ed. 180 (1948)). These principles, applied here, compel the conclusion that Powell's counsel's performance was not deficient in failing to raise the collateral estoppel claim on direct appeal. This is so because the jury could not have grounded Powell's capital murder conviction in his first trial on Powell's attempted rape of Stacey. As noted in Part III *supra,* the bill of particulars limited the Commonwealth to proving the capital murder of Stacey based on the rape or attempted rape of Kristie. Hence, the question whether Powell attempted to rape Stacey could not have been, and was not, "necessarily decided ... against the prosecution" as required for a collateral estoppel claim by *Ashe. See Powell,* 590 S.E.2d at 551.

Yet, even assuming counsel's performance was deficient in this regard, the Supreme Court of Virginia correctly found that Powell cannot demonstrate prejudice from counsel's failure to raise the collateral estoppel claim on direct appeal. This is so because counsel did raise, and the Supreme Court of Virginia rejected, a nearly identical "law of the case" argument on direct appeal. *Id.* There, Powell alleged that the Commonwealth's Attorney argued in Powell's first trial that Powell "wanted something more" from Stacey and that it had evidence that Powell "was having sex or attempting to have sex with [Stacey]." *Id.* at 550-51. Powell argued on direct appeal that because the indictment and the jury

instructions were silent as to the victim of the gradation crime, the jury must have considered and rejected the attempted rape of Stacey as a basis for a capital murder conviction. *Id.* at 551. Significantly, the Supreme Court of Virginia rejected this claim, applying *Ashe* the same standard that applies to and dooms Powell's collateral estoppel claim. *Id.*

Based on its rejection of Powell's "law of the case" claim on direct appeal, the Supreme Court of Virginia during Powell's state habeas proceedings found that Powell suffered no prejudice from counsel's failure to raise the collateral estoppel claim. This finding was correct because Powell's "law of the case" claim on direct appeal was virtually identical to the collateral estoppel argument he made at the state habeas stage, both in terms of its factual basis and the applicable law necessary to resolve the claim; thus, even if counsel had raised the collateral estoppel claim at the same time as it raised the law of the case claim, the result would have been the same for both claims. It clearly follows that Powell's claim fails under either a *de novo* or a deferential standard of review.

B.

Powell's next procedurally defaulted claim arises from his interrogation concerning the letter he wrote to the Commonwealth's Attorney while awaiting retrial after his successful appeal from the first conviction. In addition to the non-defaulted Sixth Amendment claim discussed in Part VI *supra,* Powell

claims his statements were involuntary because (i) Powell was taking *Depakote* and *Atarax* and (ii) the interrogator exceeded the promised scope of the questioning. Powell argues these claims were defaulted in the Virginia habeas proceeding owing to his counsel's ineffectiveness in not challenging the use of these statements during his trial and appeal.

First, Powell contends that the Commonwealth violated his Fourth, Fifth, and Fourteenth Amendment rights by interrogating him while he was under the influence of Depakote and Atarax and that these drugs rendered his statements involuntary. The Supreme Court of Virginia found this claim procedurally defaulted during state habeas proceedings and rejected the argument that counsel had been ineffective in failing to raise the claim earlier. *Powell,* 2005 WL 2980756, at *8. It found neither deficient performance nor prejudice under *Strickland* because Powell "voluntarily and knowingly waived his *Miranda* rights." *Id.* It further held that Powell made no showing of the drugs' effects on his personality. Rather, it found that the record demonstrated that Powell was "coherent and able to understand the questions [the detective] was asking." *Id.* In short, the Supreme Court of Virginia found that because there was no evidence that the drugs had any effect on Powell and because his statements otherwise appeared wholly voluntary, there was no reason for counsel to object to the admission of his statements on the grounds of involuntariness. *Id.* Powell contends that this was an unreasonable application of *Strickland* and that the

Supreme Court of Virginia's determination of the facts was unreasonable in light of the evidence presented. *See* § 2254(d)(1) & (2).

To determine whether a statement was voluntary, a court must examine "whether the confession was extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of improper influence." *Hutto v. Ross,* 429 U.S. 28, 30, 97 S. Ct. 202, 50 L. Ed. 2d 194 (1976) (quoting *Bram v. United States,* 168 U.S. 532, 542-43, 18 S. Ct. 183, 42 L. Ed. 568 (1897) (internal punctuation omitted)). Yet, "[t]he mere existence of threats, violence, implied promises, improper influence, or other coercive police activity ... does not automatically render a confession involuntary." *United States v. Braxton,* 112 F.3d 777, 780 (4th Cir. 1997). Rather, a court examining the voluntariness of a statement must look to the totality of the circumstances to determine "whether the defendant's will has been 'overborne' or his 'capacity for self-determination critically impaired.'" *United States v. Pelton,* 835 F.2d 1067, 1071 (4th Cir. 1987) (quoting *Schneckloth v. Bustamonte,* 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). Thus, where, as here, a defendant claims that certain drugs rendered a statement involuntary, a court must review the totality of the circumstances to determine whether those drugs caused the defendant's will to be "overborne" such that his statements were involuntary.

Here, the Supreme Court of Virginia correctly found

that the totality of the circumstances showed that Powell's statements were voluntary. *See* 2005 WL 2980756, at *8. The record reflects that Powell never appeared to be confused during his conversation with the detective, nor did his will appear "overborne." Rather, the totality of the circumstances show that Powell was fully possessed of his faculties. *See id.* Because Powell's statement appeared wholly voluntary, counsel's performance in failing to object to its admission was not deficient.

Even assuming Powell could show his statements were involuntary and thus counsel's performance was deficient in this regard, Powell cannot show prejudice because his letter confessing to and detailing his attempted rape of Stacey would have been admissible notwithstanding the exclusion of Powell's statements. This letter was not only authenticated by Powell during the detective's questioning, but also by a handwriting comparison. J.A. at 745-50. Thus, even without the statements Powell made during questioning, the jury would have had an authenticated letter from Powell admitting to the attempted rape and murder of Stacey. It follows that Powell was not prejudiced by the admission of his statements at trial.

In sum, Powell's ineffectiveness claim fails under either *de novo* or deferential review because he has not shown that his statements were involuntary and because he was not prejudiced by the admission of his statements at trial.

The same principles that foreclose Powell's claim that the drugs rendered his statements involuntary doom Powell's claim that his statements were involuntary because the detective exceeded the questioning's promised scope. The detective told Powell that "the only promise that I made to you is that we're just going to discuss those letters relating to this rape. We're not going to talk about the murder or anything else, okay." J.A. at 1082. Notwithstanding this promise, the questioning eventually covered Stacey's murder and Powell's intent regarding the rest of Stacey's family. Powell claims the detective broke his promise to discuss only the attempted rape and thereby rendered Powell's statements involuntary.

The Supreme Court of Virginia found this claim to be defaulted during state habeas proceedings and rejected Powell's ineffectiveness claim as excuse for the default. *Powell,* 2005 WL 2980756, at *8. It found no deficient performance by counsel in failing to object to the statements' admission when the record indicated the statements were voluntarily and knowingly made, noting that Powell was told he could stop questioning at any time. *Id.* Moreover, when Powell signed the *Miranda* waiver form, he initialed that no promises had been made to him with respect to the ensuing interrogation. *Id.* At no point did Powell invoke his right to silence or to counsel, even after the detective questioned him on matters beyond the scope of the attempted rape. *Id.*

A statement is not inadmissible simply because an

investigator states that questioning will be limited to a certain topic and then later questions the defendant on additional topics. *See Braxton,* 112 F.3d at 780. Rather, the question whether a statement is involuntary and hence inadmissible because it is a "result of 'any direct or implied promises'"[33] depends on whether a review of the totality of the circumstances shows that "the defendant's will has been 'overborne' or his 'capacity for self-determination critically impaired.'" *United States v. Pelton,* 835 F.2d 1067, 1071 (4th Cir. 1987) (quoting *Schneckloth v. Bustamonte,* 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)).

Under either a *de novo* or deferential review standard, Powell's claim fails. In the first place, the record does not reflect that the promise was broken so much as it reflects that Powell invited questioning about Stacey's murder by raising the topic himself.[34] Powell also initialed on his *Miranda* waiver form that no promises had been made to him. Nor did Powell request that the questioning cease once it

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[33] *Hutto*, 429 U.S. at 30, 97 S. Ct. 202.

[34] Before the detective mentioned Stacey's murder, Powell told the detective that "I could have killed her at any time. She wasn't expecting it." J.A. at 1085. He also stated that he didn't tell the detective about his attempted rape of Stacey before his first trial because "I knew that I'd a got [sic] in more trouble if I said it and then I knew that she was dead." *Id.* After answering the detective's questions about the attempted rape, Powell said that "then I pulled my knife out and you know, she looked at me you know. I guess she thought I wouldn't stab her or whatever. So she tried to leave and go to answer the phone. That's that." *Id.* at 1089.

went beyond the topic of the attempted rape. In sum, there is simply no evidence that Powell's will was overborne by the detective's broken promise. To the contrary, the totality of the circumstances show that Powell knowingly and voluntarily spoke with the detective.

Given this, counsel's performance was not deficient in choosing not to object to the admissibility of Powell's statements on voluntariness grounds. Moreover, as already explained, Powell cannot demonstrate prejudice from the admission of his statements at trial, because Powell's letter confessing to the crime would have been admissible even without Powell's statements to police. The Supreme Court of Virginia's application of *Strickland* in this regard was not only reasonable, but correct, and Powell's claim fails.

C.

Powell next claims that the Commonwealth violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights by imposing unnecessary security measures on him, rendering him incapable of participating meaningfully in his trial. Specifically, he claims that the Commonwealth treated him with an unusual and unnecessary combination of mood-altering drugs, including *Depakote, Risperdal, Paxil,* and *Zoloft,* at the same time, which made him appear "cold, expressionless, and remorseless during the trial." Pet. at 32. He was also forced to wear a stun belt during the trial for security reasons. Powell does not

allege that the jury saw the stun belt, but claims the belt effectively prevented him from meaningfully engaging with counsel because he feared he would be stunned if he moved. Powell claims that the drugs and stun belt affected the penalty phase of the trial, as at least two jurors stated in affidavits that they believed Powell had a "hard," "expressionless," "arrogant," "remorseless," and "cold" appearance during his trial. H.A. at 2784-86.

The Supreme Court of Virginia found these claims procedurally defaulted during state habeas proceedings and rejected Powell's contention that ineffective assistance of counsel excused the default. *Powell,* 2005 WL 2980756, at *13. That court noted first that there is no evidence that any juror saw Powell wearing the stun belt. *Id. Cf. Deck v. Missouri,* 544 U.S. 622, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005) (holding that, "given their prejudicial effect, due process does not permit the use of *visible* restraints if the trial court has not taken account of the circumstances of the particular case") (emphasis added). Nor, the court observed, did Powell allege that the drugs he received were involuntarily administered. *Powell,* 2005 WL 2980756, at *13. *Cf. Riggins v. Nevada,* 504 U.S. 127, 134, 112 S. Ct. 1810, 118 L. Ed. 2d 479 (1992) (holding that "forcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical appropriateness").

Powell cites no U.S. Supreme Court precedent

holding that a defendant's constitutional rights are violated where he is medicated, pursuant to a physician's prescription, and where he never refused those prescribed medications. Nor does Powell cite any U.S. Supreme Court case suggesting that a defendant subject to non-visible restraints is denied a constitutionally fair trial. There is simply no evidence that any juror saw Powell's stun belt, and Powell has never alleged that he was involuntarily or forcibly medicated. Thus, Powell has not alleged any constitutional error and his claim fails.[35]

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[35] Powell requests an evidentiary hearing for this claim and for the claim that the drugs he took during his questioning rendered his statements involuntary. He believes the Supreme Court of Virginia put him in a "classic catch-22" by holding that Powell had not proved the drugs had any effect on him but denying him an evidentiary hearing on this claim. Response of Pet. at 22.

To receive an evidentiary hearing in a federal forum, a petitioner must show that, if proved, "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found [him] guilty of the underlying offense." § 2254(e)(2). Importantly, where "the record refutes the applicant's factual allegations or otherwise precludes habeas relief, a district court is not required to hold an evidentiary hearing." *Schriro v. Landrigan*, --- U.S. ----, ----, 127 S. Ct. 1933, 1940, 167 L. Ed. 2d 836 (2007).

Here, Powell would not be entitled to relief even if he proved the underlying facts of his claim. This is so because even if Powell could show his medications affected his behavior at trial, he has not shown he was involuntarily or forcibly medicated. Similarly, even if Powell proved that Depakote and Atarax affected his behavior during his questioning, Powell was not prejudiced from the introduction of his statements into

D.

Powell next claims that his due process right to a reliable sentencing hearing was violated by the admission, during the sentencing phase of his second trial, of an uncertified report of Powell's criminal history from the National Crime Information Center (NCIC) that contained factual errors and other inadmissible information. The NCIC report incorrectly stated that Powell previously had been convicted of two counts of capital murder. Thus, the NCIC report states that Powell had six felony convictions, when in fact he had only four. The report also referenced a pending capital murder charge, presumably the charge for which Powell was standing trial. Finally, the report contained factually correct entries that Powell alleges were inadmissible at trial, such as charges that were *nolle prossed*[36] or for which Powell was found not guilty.[37] The Supreme Court of Virginia found this claim defaulted under *Slayton,* and rejected Powell's ineffective assistance of counsel claim as an excuse for the default. *Powell,* 2005 WL 2980756, at *3-*4, *14.

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evidence. Hence, Powell is not entitled to an evidentiary hearing on these claims.

[36] There are six entries for charges that were *nolle prossed:* contributing to the delinquency of a minor, unlawful entry, larceny, issuing a bad check, and two counts of statutory burglary. Powell contends that the jury was not informed of the meaning of "*nolle prossed*," and that the jurors therefore would have thought these entries referred to convictions.

[37] There are five entries for crimes for which Powell was found not guilty: three counts of the use or display of a firearm in commission of a felony, an attempt to commit a noncapital

The Supreme Court of Virginia found, in its first opinion denying Powell's state habeas petition, that one capital murder conviction entry listed on the report referenced Powell's first conviction for the capital murder of Stacey, which was reversed on appeal. *Id.* at *14. On Powell's petition for rehearing, the Supreme Court of Virginia found that the other incorrect capital murder conviction entry referred to Powell's conviction for the *attempted* capital murder of Kristie and that the report erroneously omitted the word "attempted." *Powell,* 634 S.E.2d at 298. Despite acknowledging these errors, the Supreme Court of Virginia initially found that counsel's failure to object to the admission of the report constituted neither deficient performance nor prejudice under *Strickland. See Powell,* 2005 WL 2980756, at *14. On rehearing, however, the Supreme Court of Virginia found no ineffective assistance of counsel under *Strickland* based solely on the fact that Powell had not demonstrated that he was prejudiced by counsel's failure to object to the report's admission. *See Powell,* 634 S.E.2d at 299.

Under *Strickland,* a defendant who claims ineffective assistance of counsel as a basis for overturning a sentence of death must show that "absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland,* 466 U.S. at 695,

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offense, and robbery. Importantly, each of these entries specifically noted that Powell had been found "not guilty" of these charges.

104 S. Ct. 2052. Where, as in Virginia, unanimity is required for a death sentence, prejudice exists if "there is a reasonable probability that at least one juror would have struck a different balance." *Wiggins,* 539 U.S. at 537, 123 S. Ct. 2527. Thus, even assuming counsel's performance was deficient in failing to object to the admission of the NCIC report, Powell must show a reasonable probability that at least one juror would not have imposed the death penalty had the report not been admitted.

In this regard, the Supreme Court of Virginia's *Strickland* analysis was not objectively unreasonable.[38] The court first exhaustively listed

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[38] Powell argues unconvincingly that the Supreme Court of Virginia applied the wrong law, or applied *Strickland* unreasonably, because it stated that a petitioner seeking to prove prejudice under *Strickland* faced a "highly demanding" burden. *Powell,* 634 S.E.2d at 296 (quoting *Kimmelman v. Morrison,* 477 U.S. 365, 382, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986)). Powell does not dispute that the U.S. Supreme Court in *Kimmelman* used the "highly demanding" language, but notes that it did so only in analyzing the deficient performance prong of *Strickland.* Thus, Powell claims the Supreme Court of Virginia impermissibly inflated the prejudice prong of *Strickland* by applying *Kimmelman's* "highly demanding" language out of context. While the Supreme Court of Virginia did cite *Kimmelman's* language in analyzing the prejudice prong, it also made clear that it was aware of and applied the proper standard, stating that "Powell has failed to demonstrate *a reasonable probability* that the result of the capital murder trial would have been different and hence he has not suffered prejudice as required by the highly demanding standard that the Supreme Court established in *Strickland.*" *Id.* at 297 (emphasis added). In short, the Supreme Court of Virginia did not make the prejudice prong more demanding than it already

the evidence presented to the jury that demonstrated Powell's future dangerousness: (i) the heinous details of his crimes, (ii) his letters bragging to the Commonwealth's Attorney and taunting Stacey's mother, (iii) his letter to a friend stating that he had intended to "go to North Carolina and knock this dude off," (iv) his letter to the Commonwealth's Attorney that he wanted to get out of prison to "kill ... everybody else in this fucked up country that's not white," (v) his letter to a friend asking someone to threaten Kristie not to testify, and (vi) his admission to police that he wanted to "[k]ill a lot of somebodies ... [j]ust for something to do." *See Powell,* 634 S.E.2d at 290-94.

The Supreme Court of Virginia then noted that the prosecutor relied little on Powell's criminal history in arguing future dangerousness. The entirety of the prosecutor's use of the document bears quoting here:

> Your honor, as an initial matter, the Commonwealth would move for the introduction of the Certified Copy of the Defendant's prior criminal record consisting of two convictions in 1997 for contributing to the delinquency of a minor. One conviction in 1999 for that same crime. A petty larceny in 1998 and a grand larceny in 2001 along with the three felony convictions that is; rape, abduction with intent to defile and attempted capital murder involving Kristie.

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was, but simply acknowledged that the standard was high and held that Powell had not met it.

Id. at 296. Importantly, the prosecutor correctly summarized Powell's prior convictions, never suggesting Powell had been convicted of other capital murder charges. *Id.* at 297.

After reviewing the aggravating evidence and the limited role the NCIC report played in the sentencing phase of Powell's trial, the Supreme Court of Virginia correctly noted that under *Strickland,* "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 298 (citing *Strickland,* 466 U.S. at 696, 104 S. Ct. 2052). It then concluded that, in light of the overwhelming aggravating evidence of Powell's violent tendencies, Powell had not shown that but for the admission of the NCIC report, at least one juror would have chosen not to impose a death sentence. *Id.* Even assuming that counsel's performance was deficient in failing to object to the report's admission, then, the Supreme Court of Virginia correctly concluded that Powell has not shown that this deficiency affected the outcome of his sentence.[39] Thus, under either a *de novo* or

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[39] Powell's claim that the Supreme Court of Virginia's determination of this claim was contrary to *Tuggle v. Netherland*, 516 U.S. 10, 116 S. Ct. 283, 133 L. Ed. 2d 251 (1995), fails for two reasons. First, *Tuggle* applies in cases where an aggravating factor is invalidated. *See Brown v. Sanders*, 546 U.S. 212, 218-19, 126 S. Ct. 884, 163 L. Ed. 2d 723 (2006). Here, the Supreme Court of Virginia did not invalidate the future dangerousness factor, but instead found the admission of the NCIC report had not prejudiced the jury's

deferential review, Powell's ineffectiveness claim in this regard fails.

Contrary to Powell's argument, this result is not changed by the fact that the jury in Powell's first trial did not find the future dangerousness factor proved beyond a reasonable doubt. Powell argues that the jury in his second trial must have been influenced by the NCIC report, as it found the future dangerousness aggravating factor proved beyond a reasonable doubt, whereas the jury in his first trial did not receive the erroneous report and did not find that the future dangerousness aggravating factor had been proved. This argument misses the mark, as the question of future dangerousness in Virginia depends on the facts and circumstances of each individual case. It follows that Powell cannot use the outcome of his first trial as evidence of prejudice in his second trial. *See infra* Part VIII.E; *see also* Va. Code § 19.2-264.4(C). Indeed, the jury in Powell's second trial was provided with evidence not presented in his first trial, such as Powell's letter to the Commonwealth's Attorney, from which it could have determined Powell's future dangerousness.

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finding of future dangerousness because other, properly-admitted evidence overwhelmingly supported this finding.

Second, Powell misstates the Supreme Court of Virginia's opinion. Contrary to his argument, the Supreme Court of Virginia did not hold that Powell could not demonstrate prejudice because the jury had also found the vileness aggravating factor satisfied. Rather, the Supreme Court of Virginia simply found that the vileness factor was not affected by the NCIC report. *See Powell*, 634 S.E.2d at 298.

Also unpersuasive is Powell's claim that false evidence of a defendant's criminal history presented during sentencing is *per se* prejudicial. First, as Powell acknowledges, the Supreme Court has never set forth a bright-line rule holding inaccurate criminal history information introduced during sentencing to be *per se* prejudicial. To the contrary, *Strickland* requires a court to review the facts of a particular case to determine whether counsel's deficient performance prejudiced the defendant. The *per se* rule of prejudice Powell advocates would not allow a court, in accord with *Strickland,* to review the totality of the aggravating and mitigating circumstances to determine whether the introduction of the false report was prejudicial. Moreover, while Powell cites cases in which inaccurate criminal history presented during sentencing was found to be prejudicial, these cases are distinguishable because the prosecutor in those cases, unlike the prosecutor in this case, explicitly relied on and referenced the inaccurate criminal convictions when presenting aggravating evidence to the jury during sentencing.[40]

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[40] *See Duest v. Singletary*, 967 F.2d 472, 474-75 (11th Cir. 1992), *vacated on other grounds by* 507 U.S. 1048, 113 S. Ct. 1940, 123 L. Ed. 2d 647 (1993) (noting that the prosecutor explicitly described convictions to the jury during sentencing that were later reversed); *Lewis v. Lane*, 832 F.2d 1446 (7th Cir. 1987) (finding prejudicial the admission of two inaccurate prior felony convictions where prosecutor explicitly relied on inaccuracies during sentencing and closing arguments). Also inapposite, for the same reason, are those cases cited by Powell in which federal sentences were reversed because the sentencing judge explicitly relied upon false information. *See,*

Powell next claims that the Supreme Court of Virginia's resolution of this issue was an unreasonable application of federal law because it reviewed the prejudicial effect of the two inaccurate entries in separate opinions, rather than "cumulatively." In support of this claim, Powell relies

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e.g., United States v. Pugliese, 805 F.2d 1117, 1124 (2d Cir. 1986).

Powell's reliance on *Johnson v. Mississippi*, 486 U.S. 578, 108 S. Ct. 1981, 100 L. Ed. 2d 575 (1988), is misplaced. There, the Supreme Court held that a habeas petitioner's death sentence, which was predicated in part on the prosecution's express reliance on a felony conviction that was later invalidated, violated the Eighth Amendment. It noted that "[e]ven without [the prosecutor's] express argument [about the prior conviction], there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.'" *Id.* at 586, 108 S. Ct. 1981 (quoting *Gardner v. Florida*, 430 U.S. 349, 359, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977)). Powell relies on this statement for the proposition that false criminal history presented at sentencing is *per se* prejudicial, regardless of whether the prosecutor relies on that false information explicitly. This claim fails because Johnson's statement that false information not explicitly relied upon during sentencing would have a "possibility" of prejudice is not sufficient to demonstrate prejudice under *Strickland*, which requires a petitioner seeking to demonstrate prejudice in sentencing to prove that "there is a *reasonable probability* that at least one juror would have struck a different balance." *Wiggins*, 539 U.S. at 537, 123 S. Ct. 2527 (emphasis added). A "reasonable probability" is a higher standard than Johnson's "possibility." Johnson is also distinguishable because it is an Eighth Amendment case, not an ineffective assistance of counsel case.

on *Miller-El v. Dretke,* 545 U.S. 231, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005), in which the Supreme Court granted habeas relief in favor of a petitioner who demonstrated discriminatory jury selection based on the prosecutor's use of peremptory strikes. The Supreme Court noted that some of the prosecutor's actions might have non-discriminatory explanations, but that "when this evidence on the issues raised is viewed cumulatively its direction is too powerful to conclude anything but discrimination." *Id.* at 265, 125 S. Ct. 2317.

Powell's argument fails for two reasons. First the Supreme Court in *Miller-El* was analyzing a discrimination claim and in no way suggested that a court applying *Strickland* must somehow cumulate errors when determining prejudice. Hence, no U.S. Supreme Court case requires Powell's suggested analysis. Powell's argument also fails because it is simply illogical-two errors, which separately do not prejudice a defendant, cannot be prejudicial simply because they are added together. In other words, zero plus zero is still zero.

Finally, Powell has failed to demonstrate that the Supreme Court of Virginia reached an unreasonable determination of the facts in light of the evidence presented for purposes of § 2254(d)(2). He argues first that it was unreasonable for the Supreme Court of Virginia to find that the jury knew that the entries on the NCIC report were false. Furthermore, he claims the jury did not know that the inaccurate entries referred to (i) his conviction for the attempted

capital murder of Kristie and (ii) Powell's vacated conviction for the capital murder of Stacey subsequent to the rape of Kristie.[41]

Powell's claim fails because it is reasonable to believe the jury understood Powell had not previously been convicted of the capital murder of two other victims in addition to Stacey. First, the jury knew Powell's previous conviction of the capital murder of Stacey had been successfully appealed and vacated, based on Powell's letter to the Commonwealth's Attorney and on Powell's counsel's statements. J.A. at 801-07, 813-14, 862. The jury also heard detailed testimony about Powell's crimes against Kristie and knew that

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[41] Powell also argues that the Supreme Court of Virginia's determination of fact was unreasonable in light of the evidence presented because, in each of its opinions denying Powell's petition for habeas relief, it only acknowledged one inaccurate entry for capital murder on the NCIC report, while ignoring the other. This mischaracterizes the Supreme Court of Virginia's opinions. The first habeas opinion acknowledged that the NCIC report contained multiple errors, but only discussed the prejudice to Powell of one erroneous capital murder conviction entry. *Powell*, 2005 WL 2980756, at *14. Then, in its second habeas opinion, the Supreme Court of Virginia addressed the prejudice stemming from the second capital murder conviction entry. Thus, the Supreme Court of Virginia specifically discussed and analyzed each of the two false entries for capital murder convictions on the NCIC report, but did not discuss the prejudice from the pending capital murder charge, the *nolle prossed* charges, or the charges for which Powell was not found guilty. Contrary to Powell's argument, however, the Supreme Court of Virginia did not specifically find that there were only two errors in the NCIC report. Hence, contrary to Powell's argument, the Supreme Court of Virginia's factual determination was not unreasonable.

he was serving three life sentences for those crimes. J.A. at 691-711, 813. Additionally, in introducing the NCIC report, the Commonwealth's Attorney correctly stated that Powell had been convicted of the attempted capital murder of Kristie. J.A. at 881. Thus, it is reasonable to assume that the jury, upon seeing two entries for capital murder not mentioned by the prosecution, would understand that the NCIC entries were inaccurate and actually referred to the attempted capital murder of Kristie and the vacated conviction for the capital murder of Stacey.

In sum, the Supreme Court of Virginia correctly found that Powell failed to demonstrate prejudice from the admission of the NCIC report. Nor did the Supreme Court of Virginia make an unreasonable determination of the facts under § 2254. Thus, under either a *de novo* or a deferential standard of review, Powell's claim for habeas relief on this ground fails.[42]

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[42] Powell also baldly asserts, with no supporting detail, three additional claims stemming from the admission of the NCIC report: an Eighth Amendment claim, a Fourteenth Amendment claim, and a "Napue" claim. Although Powell does not name the full case or cite it, "Napue" likely refers to *Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), which held that a conviction obtained through the use of false testimony, known to be such by representatives of the state, is a denial of due process. But, as Powell mentions these three claims in one sentence in his reply to the Commonwealth's motion to dismiss his habeas petition and does not describe them, they are appropriately dismissed.

E.

Powell next makes several claims for habeas relief based on the vileness and future dangerousness aggravating factors found by the jury. The first of these claims is that his Fifth, Sixth, and Fourteenth Amendment rights were violated because the indictment did not list the vileness and future dangerousness aggravating factors, which were the bases for the jury's death sentence. The Supreme Court of Virginia found no ineffective assistance of counsel under *Strickland* because "[t]here is no constitutional requirement that a capital murder indictment include allegations concerning aggravating factors." *Powell,* 2005 WL 2980756, at *10 (citing *Apprendi v. New Jersey,* 530 U.S. 466, 477 n.3, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)); *see also Morrisette v. Warden of Sussex I State Prison,* 270 Va. 188, 613 S.E.2d 551, 556 (2005). Thus, the Supreme Court of Virginia found trial counsel was not ineffective for failing to raise the issue.

The Supreme Court of Virginia's resolution of this issue was not an unreasonable application of *Strickland,* given, as it correctly noted, that no U.S. Supreme Court precedent requires aggravating factors to be alleged in an indictment. Rather, the U.S. Supreme Court requires only that such factors must be found by a jury. *See Blakely v. Washington,* 542 U.S. 296, 301-02, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Ring v. Arizona,* 536 U.S. 584, 589, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). Powell's sentence

complied with this precedent. Thus, Powell's claim for habeas relief on the ground that the aggravating factors were required to be listed in the indictment is without merit, as a federal court can only grant habeas relief on the basis of violations of "clearly established Federal law, as determined by the Supreme Court of the United States." *See* § 2254(d)(1).

Next, Powell claims that the doctrine of collateral estoppel barred relitigation of his future dangerousness in his second trial, as the jury in his first trial had considered and rejected this aggravating factor. The Supreme Court of Virginia found this claim procedurally defaulted during state habeas proceedings and rejected Powell's ineffective assistance of counsel claim as excuse for the default. *Powell,* 2005 WL 2980756, at *11. In this respect, the Supreme Court of Virginia noted that future dangerousness of an individual, under Virginia law, "may be based solely on 'the circumstances surrounding the commission of the offense of which he is accused.'" *Id.* (citing Va. Code § 19.2-264.4(C); *Murphy v. Commonwealth,* 246 Va. 136, 431 S.E.2d 48, 53 (1993)). It then found Powell's collateral estoppel claim without merit because Powell was charged with a crime in his second trial that was different from the crime charged in his first trial. *Id.* In short, the Supreme Court of Virginia held that future dangerousness is offense-specific. Because Powell's future dangerousness with respect to the particular charge in his second trial had not previously been litigated, the Supreme Court of

Virginia found that counsel's performance was not deficient and that Powell had not shown a reasonable probability that, "but for counsel's alleged errors, the result of the proceeding would have been different." *Powell*, 2005 WL 2980756, at *11. This application of *Strickland* was not merely reasonable, it was correct. Because Powell's two trials were for different crimes, he was not insulated from a jury considering his future dangerousness in his second trial simply because he had been previously tried for a different capital murder offense for which the jury had considered Powell's future dangerousness.

Next, Powell contends that his Fifth, Eighth, and Fourteenth Amendment rights were violated by a vague jury instruction on the vileness aggravating factor. The trial court instructed the jury that to find vileness, it must find Powell's "conduct in committing the offense was outrageously or willfully vile, horrible, or inhumane, and that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder." J.A. at 1018. Powell claims this instruction, without a limiting instruction, was unconstitutionally vague.[43] On direct appeal from the second conviction, the Supreme Court of Virginia found that Powell had waived this claim by failing to brief it adequately.

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[43] *See Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135, 149 (1978) (noting that "it is conceivable that the language defining the [vileness] aggravating circumstance could be tortured to mean that proof of an intentional killing is all the proof necessary to establish that circumstance").

Powell, 590 S.E.2d at 554. Powell then alleged during state habeas proceedings that counsel was ineffective for failing to raise this issue at trial. The Supreme Court of Virginia reasonably rejected this argument, as counsel did object to the vileness instruction at trial. *See Powell,* 2005 WL 2980756, at *11. Moreover, even if Powell had properly preserved this claim during state proceedings, it would fail on the merits during federal habeas review, as the Fourth Circuit has repeatedly rejected vagueness challenges to the precise jury instruction used by the trial court here. *See, e.g., Tuggle v. Thompson,* 57 F.3d 1356, 1372 (4th Cir. 1995), *rev'd on other grounds,* 516 U.S. 10, 116 S. Ct. 283, 133 L. Ed. 2d 251 (1995); *Barnabei v. Angelone,* 214 F.3d 463, 472 (4th Cir. 2000), *abrogated on other grounds by Bell v. Jarvis,* 236 F.3d 149 (4th Cir. 2000).

Powell's next claim is that the trial court's instruction to the jury on the future dangerousness factor was vague and contradictory. In this respect, the trial court instructed the jury that it must find beyond a reasonable doubt that "after consideration of [Powell's] history and background there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society." *Powell,* 2005 WL 2980756, at *11. He claims that "beyond a reasonable doubt" contradicts "probability" such that a reasonable juror could not determine the proper standard to apply when considering Powell's future dangerousness.

The Supreme Court of Virginia found this claim

defaulted and rejected Powell's ineffectiveness claim as excuse for the default. *Id.* It held that counsel was not deficient for failing to object to this jury instruction, as the Supreme Court of Virginia had previously rejected an identical challenge to this jury instruction in a different case. *Id.* (citing *Mickens v. Commonwealth,* 247 Va. 395, 442 S.E.2d 678, 684 (1994)).[44] Moreover, because the Supreme Court of Virginia would have followed its own precedent in rejecting this claim even if counsel had raised it, Powell cannot show he was prejudiced by the failure to raise this issue. It follows that Powell cannot show that counsel was ineffective under *Strickland* or that the Supreme Court of Virginia unreasonably applied either prong of *Strickland* in adjudicating this claim.

F.

Finally, Powell claims that Virginia's procedures for post-conviction review violated his due process rights by: (i) limiting capital habeas petitioners to fifty-page petitions; (ii) refusing to appoint Powell certain requested experts to develop his claims; and (iii) determining certain facts without first holding evidentiary hearings. Only the second of these claims was raised in state court, so the remaining two claims are barred from federal habeas review. *See Gray v. Netherland,* 518 U.S. 152, 162, 116 S. Ct.

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[44] Notably, the Fourth Circuit also has repeatedly rejected challenges to the future dangerousness statute. *See Spencer v. Murray,* 5 F.3d 758, 764-65 (4th Cir. 1993).

2074, 135 L. Ed. 2d 457 (1996).[45]

Even if they were not defaulted, these claims, as well as Powell's claim that the failure to appoint experts rendered Virginia habeas procedure constitutionally infirm, would fail because "a challenge to Virginia's state habeas corpus proceedings cannot provide a basis for federal habeas relief." *Wright v. Angelone,* 151 F.3d 151, 159 (4th Cir. 1998) (citing *Bryant v. Maryland,* 848 F.2d 492, 493 (4th Cir. 1988)).[46] This is so because a "federal court 'shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.'" *Wright,* 151 F.3d at 159 (citing 28 U.S.C. § 2254(a)). Thus, a challenge to procedures

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[45] These claims are simultaneously exhausted and defaulted. They are exhausted because Powell could not bring a successive state habeas petition on these claims. *See* Va. Code § 8.01-654.1. *See Matthews v. Evatt,* 105 F.3d 907, 911 (4th Cir. 1997). They are also defaulted because a state "procedural bar that gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default." *See Gray,* 518 U.S. at 162, 116 S. Ct. 2074 (citing *Teague v. Lane,* 489 U.S. 288, 298, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989)). Powell offers no such "cause and prejudice" for his defaulted claims, so a federal habeas court may not review them.

[46] *See also Barner v. Warden, Buckingham Correctional Center,* 37 F.3d 1492, 1994 WL 545010 (4th Cir. 1994); *Bell v. True,* 413 F. Supp. 2d 657, 735 (W.D. Va. 2006); *Orbe v. True,* 233 F. Supp. 2d 749, 787 (E.D. Va. 2002).

employed by a state habeas court is not cognizable on federal habeas review, because the petitioner is not "'detained as a result of a decision of the Virginia Supreme Court in the state habeas action,' but rather is in custody pursuant to the ruling of the original trial court." *Orbe,* 233 F. Supp. 2d at 787.

Accordingly, Powell's challenges to Virginia's post-conviction procedures must fail.

Conclusion

For the reasons stated above, Powell's petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, must be dismissed. Accordingly, the stay of execution entered by Order dated July 6, 2007, must be vacated.

An appropriate Order will issue.

Appendix C

Supreme Court of Virginia.
Paul Warner POWELL
v.
WARDEN OF THE SUSSEX I STATE PRISON.
Record No. 042716.

Sept. 15, 2006.

Present: All the Justices.

OPINION BY Chief Justice LEROY R. HASSELL, SR.

I.

In this habeas corpus proceeding, we consider whether petitioner, who was convicted of capital murder for the killing of Stacey Lynn Reed during the commission of or subsequent to an attempted rape in violation of Code § 18.2-31(5), suffered prejudice within the meaning of *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) because his trial counsel failed to object to the admission in evidence of a form that contained an inaccuracy regarding petitioner's criminal history.

II.

In September 2000, Paul Warner Powell was sentenced to death for the capital murder of Stacey

Lynn Reed. On direct appeal, this Court reversed the conviction and remanded the case to the circuit court for a new trial on a charge no greater than first-degree murder for the killing of Stacey Reed, if the Commonwealth be so advised. *Powell v. Commonwealth,* 261 Va. 512, 552 S.E.2d 344 (2001).

After the proceeding was remanded, Powell wrote a letter to the Commonwealth's Attorney who had prosecuted Powell during the first trial. Powell described, in detail, the murder and attempted rape of Stacey Reed, and he provided facts that were previously unknown to the Commonwealth. The Commonwealth then nolle prossed the indictment in the remanded case. A grand jury for Prince William County subsequently indicted Powell for the capital murder of Stacey Reed during the commission of or subsequent to an attempted rape. Powell was tried by a jury that convicted him of capital murder and fixed his punishment at death. The circuit court entered a judgment confirming the jury's verdict and we affirmed that judgment. *Powell v. Commonwealth,* 267 Va. 107, 590 S.E.2d 537 (2004).

Subsequently, Powell filed a petition for habeas corpus in this Court alleging numerous claims, including ineffective assistance of counsel. During the sentencing hearing, the Commonwealth introduced in evidence, without objection, Exhibit 51 that is attached to this opinion. Exhibit 51, captioned Powell's "Virginia Criminal Record," consists of five pages and was generated by the Federal Bureau of Investigation, National Crime Information Center.

Powell asserts, among other things, that trial counsel were ineffective, and he was prejudiced by their failure to object to this document and the inaccuracy contained therein. We entered an order rejecting all Powell's habeas corpus claims. *Powell v. Warden of the Sussex I State Prison,* Record No. 042716, 2005 WL 2980756 (Nov. 8, 2005).

Powell filed a petition for rehearing and requested that this Court reconsider its order dismissing his habeas claims, including his claim that he was denied effective assistance of counsel because of counsel's failure to object to an erroneous entry on page three of Exhibit 51. This Court granted Powell a rehearing limited to that one claim, and we placed this matter on our argument docket.

III.

The following facts were presented to the jury that found Powell guilty of capital murder and fixed his punishment at death. In January 1999, Robert Culver and his fiancée, Lorraine Reed, lived together in Manassas, Virginia, with Reed's two daughters, Stacey Lynn Reed and Kristie Erin Reed. On January 28, 1999, Powell went to the Reeds' home. Stacey, then 16 years old, left home to go to work, and Powell remained there alone with Kristie, who was 14.

That afternoon, Kristie called her mother by telephone and informed her that Powell refused to leave the home. Kristie's mother told Kristie to order

Powell to leave. Kristie was concerned because Powell "kept walking back and forth down the hallway looking in the rooms."

On the afternoon of January 29, 1999, Kristie arrived home from school and was startled to find Powell in her house. She asked Powell "where Stacey was." He replied, "she was in her room." Kristie walked to Stacey's room, but Stacey was not there. Then, Kristie turned to enter her own room and saw Stacey's body lying on the floor.

Powell, who had followed Kristie to the bedroom, ordered Kristie to go downstairs to the basement. Kristie knew that Powell customarily armed himself with a knife. She had previously observed Powell with a butterfly knife and "another long knife that was in a brown pouch type thing."

Powell forced Kristie to accompany him to the basement, where he ordered her to remove her clothes. She took her clothes off because she "didn't want to die." Powell told Kristie to lay on the floor, and then he raped her.

After Powell raped Kristie, he dressed himself, and he used shoelaces taken from Kristie's shoes to tie her feet together. He also used shoelaces to tie her arms behind her back. Someone knocked on the door to the house, and Powell went upstairs, leaving Kristie naked and bound on the basement floor.

While Powell was upstairs, Kristie was able to free

her hands, and she tried to "scoot" across the floor and hide beneath the basement steps. Powell returned to the basement, removed Kristie's eyeglasses, and strangled her until she was unconscious. Powell stabbed Kristie in the stomach, and the knife stopped within a centimeter of her aorta. He slashed her in her neck numerous times, and the repair of the knife wounds required 61 sutures. She had multiple stab wounds to her neck and abdomen. She also had wounds on her wrists.

Robert Culver arrived at the home at 4:15 p.m. on January 29, 1999. He could not locate Kristie or Stacey. He went to the girls' bedrooms and saw that Stacey's room was in disarray. He entered Kristie's room, turned on the lights, and found Stacey's body on the floor. He observed blood on her body and saw that she was not breathing.

When Culver went to the basement in search of a telephone, he discovered Kristie lying naked and bound on the floor, bleeding from her neck and stomach. He saw that she had been stabbed in the stomach and her "throat was slit pretty severely, many times." Culver found a telephone, dialed 911, and spoke to emergency response personnel. Although Kristie was experiencing life-threatening injuries, she was able to tell police officers and paramedics that Paul Powell was her assailant.

Stacey's death was caused by a stab wound to her chest. The wound pattern indicated that the blade of the knife pierced her heart and was twisted upon

withdrawal. The blade of Powell's knife was consistent with the stab wounds.

There were numerous bruises on Stacey's head, neck, chest, abdomen, back, arms, and legs. She suffered stab wounds in her back and arm. She also had abrasions on her left hand and wrist that were characterized as defensive wounds. Stacey's body contained bruises on her lower neck that were consistent with someone stepping or stomping on her face and neck.

Police officers arrested Powell on January 30, 1999 at the home of a friend. The police officers also located a blue sports bag that belonged to Powell. A nine-millimeter semiautomatic pistol with a full magazine containing 10 Winchester nine-millimeter cartridges was in the bag. The bag also contained a survival knife with a five and one-half inch blade inside a black sheath and a butterfly knife with a five-inch blade. The survival knife sheath contained a dark reddish-brown stain. The DNA profile obtained from the stain on the sheath was consistent with the DNA profile of Stacey Reed and different from the DNA profile of Kristie Reed and Paul Powell. The probability of selecting an unrelated individual with a matching DNA profile at the Powerplex loci as contained on the sheath is approximately one in 1.1 billion in the Caucasian population.

After his arrest, Powell consented to several interviews with police officers. During one interview,

he stated that he had been at the Reeds' home on January 29, 1999 and that Stacey was dead because "she was stupid." Powell told the police officers that he and Stacey had an argument because she had a black boyfriend, and Powell "didn't agree with interracial dating." Powell claimed that during the argument, Stacey attacked him and scratched his face, and then he pushed her to the floor. He claimed that Stacey attacked him again, and that she "got stuck" on his knife. Powell also initially denied raping Kristie.

In a second statement to police officers, Powell admitted that he raped Kristie. The detective who interviewed Powell testified that Powell stated that he had to kill Kristie because "she was the only witness and he would have to go to jail."

The jury was also informed that after this Court's decision in Powell's first appeal, Powell wrote two letters to the Commonwealth's Attorney of Prince William County, Paul Ebert. Below is the content of a letter that Powell wrote, dated October 21, 2001.

"Mr. Ebert,

"Since I have already been indicted on first degree murder and the Va. Supreme Court said that I can't be charged with capital murder again, I figured I would tell you the rest of what happened on Jan. 29, 1999, to show you how stupid all of y'all mother fuckers are.

"Y'all should have known that there is more to the story than what I told by what I said. You had it in writing that I planned to kill the whole family. Since I planned to kill the whole family, why would I have fought with Stacie before killing her? She had no idea I was planning to kill everybody and talked and carried on like usual, so I could've stabbed her up at any time because she was unsuspecting.

"I had other plans for her before she died. You know I came back to the house after Bobby's lunch break was over and he had went back to work. When I got back, she was on the phone so I went inside and I laid down on the couch. When the cab came to bring me my pager, I ran out of the house and she jumped and got off the phone and came off the porch to see why I ran out of the house like I did.

"When the cab left we went in the house. I laid on the couch again and she went to her room and got her clothes and went downstairs to do her laundry. When she went downstairs, I got up and shut and locked the back door and went downstairs. We talked while she put her clothes in the wash. We continued talking when she had everything in the wash and I reached over and touched her tit and asked if she wanted to fuck. She said no, because she had a boyfriend.

"I started arguing with her because she had never turned anybody down because of having a

boyfriend.

"We started walking upstairs, arguing the whole time. When we got upstairs we went to her room and she turned the radio off. After she turned the radio off I pushed her onto her bed and grabbed her wrists and pinned her hands down by her head and sat on top of her. I told her that all I wanted to do was fuck her and then I would leave and that we could do it the easy way or the hard way.

"She said she would fuck me so I got up. After I got up, she got up and started fighting with me and clawed me face. We wrestled around a little and then I slammed her to the floor. When she hit the floor I sat on top of her and pinned her hands down again. She said she would fuck me and I told her that if she tried fighting with me again, I would kill her.

"When I got up she stood up and kept asking me why I was doing this and all I kept saying is take your clothes off. Finally she undid her pants and pulled them down to her ankles. She was getting ready to take them the rest of the way off and the phone rang. When she heard the phone she pulled her pants back up and said she had to answer the phone. I pushed her back and said no. She said that she wouldn't say anything about me being there and I told her no and to take her clothes off.

"She tried to get out of the room again and I pushed her back and pulled out my knife. I guess she

thought I was just trying to scare her and that I wouldn't really stab her because she tried to leave again.

"When she got to me and tried to squeeze between me and the door jam I stabbed her. When I stabbed her, she fell back against the door jam and just looked at me with a shocked look on her face.

"When I pulled the knife out she stumbled a couple steps and fell in her sister's room. I walked over and looked at her. I saw that she was still breathing so I stepped over her body and into the bedroom. Then I put my foot on her throat and stepped up so she couldn't breath. Then I stepped down and started stomping on her throat. Then I stepped back onto her throat and moved up and down putting more pressure to make it harder to breathe.

"When I didn't see her breathing anymore, I left the room and got some iced tea and sat on the couch and smoked a cigarette. You know the rest of what happened after that point.

"I would like to thank you for saving my life. I know you're probably wondering how you saved my life, so I'll tell you.

"You saved my life by fucking up. There were 2 main fuck-ups you made that saved me. The first was the way you worded my capital murder indictment. The second was the comment you made

in your closing argument when you said we won't know because he won't tell us.

"One more time, thank you! Now y'all know everything that happened in that house at 8023 McLean St. on Jan. 29, 1999.

"I guess I forgot to mention these events when I was being questioned. Ha Ha! Sike!

"I knew what y'all would be able to prove in court, so I told you what you already knew. Stacey was dead and no one else was in the house so I knew ya'll would never know everything she went through unless she came back to life.

"Since the Supreme Court said I can't be charged with capital murder again, I can tell you what I just told you because I no longer have to worry about the death penalty. And y'all are supposed to be so goddamn smart. I can't believe that y'all thought I told you everything.

"Well, it's too late now. Nothing you can do about it now so fuck you you fat, cocksucking, cum guzzling, gutter slut. I guess I'll see your bitch ass on Dec. 18 at trial because I'm not pleading to shit. Tell the family to be ready to testify and relive it all again because if I have to suffer for the next 50 or 60 years or however long then they can suffer the torment of reliving what happened for a couple of days.

"I'm gone. Fuck you and anyone like you or that associates with people like you. I almost forgot, fuck your god, too. Jesus knows how to suck a dick real good. Did you teach him?

"Well, die a slow, painful, miserable death. See ya punk.

"Do you just hate yourself for being so stupid and for fuckin' up and saving me?

"Sincerely,

"Paul Powell."

In a statement to a police officer on November 2, 2001, Powell gave the following description of Stacey's murder:

"She walked over to and uh I pushed her back. And then she walked over to me again I think and then I pulled my knife out and you know, and she looked at me you know. I guess she thought I wouldn't stab her or whatever. So she tried to leave and go to answer the phone. That's that.

....

"[After she got stabbed,] [s]he just looked at me for a minute you know and then you know, she ... she was surprised and them um, I pulled the knife out, you know she stumbled a few steps, fell down in Christy's doorway. I just walked over and looked at

her. And I stepped over top of her and stepped on her throat and then stood on her throat and then stomped on her throat ... then I stood on her throat until I didn't see her breathing no more.

....

"What I'm saying I was stepping on her. I'm saying I put all my weight on her. I'm saying that I put my foot there you know and then I lifted myself up to where I was standing on top of her. Started stomping on her throat. And then man, I just stood on her throat again until I didn't see her breathe no more."

Before he raped Kristie, Powell knew that he intended to kill her. In response to a police officer's question: "Before you raped [Kristie], you knew you were going to kill her; didn't you?", Powell responded: "I really didn't have a choice; did I?"

While incarcerated in jail awaiting his capital murder trial, Powell sent a letter to Lorraine Reed, the mother of Stacey and Kristie. Powell enclosed a photograph of a partially nude woman. Powell wrote:

"Lorraine,

"I was wondering if you might be able to help me think of something. I found this picture in a magazine and it kinda looks like someone I know or used to know, but I can't think of the persons name. I think you know the person too, so I was

wondering if you could tell me the name of the person this picture resembles so I can quit racking my brain trying to think of it? I would appreciate it. If you don't know the person I'm talking about, ask Kristie or Kelly Welch because I know they know who I'm thinking of. If you talk to the person I'm talking about, please give her my address and tell her to write me."

The partially nude woman shown in the photograph resembled Lorraine Reed's daughter, Stacey.

Powell wrote a letter to a friend while he was incarcerated. He stated:

"About when you asked me why I wouldn't do to you what I did to Stacie, I couldn't ever hurt you because you mean to much to me. See Stacie didn't mean anything to me. She was a nigger lover and some of her wannabe skin head friends were supposed to kill me. That's part of the reason why she died. Almost everything that happened in that house was planned. The only thing that wasn't planned was trying to fuck Kristie. What was supposed to happen was, Stacie was supposed to die, and did, Kristie was supposed to die and then I was going to wait for their mom and stepdad to get home and I was going to kill them and then I was going to take their moms truck and then I was gonna go to North Carolina and knock this dude off that stole all of my clothes and everything else I owned. I had been thinking about doing it for along time but I could never bring myself to do it. I don't

know what happened to make me finally do it. I feel bad for doing it. Stacie was a good kid."

Powell wrote, in another letter:

"Hey babe, what's happening? Not too much here. I writing you to see if you could get one of your guy friends to do me a favor. You know that Kristie is telling the cops things and that she is going to testify against me in court. I was wondering if you could get somebody to go to a pay phone and call Kristie and tell her she better tell the cops that she lied to them and tell her she better not testify against me or she's gonna die."

Powell sent the following letter to the Commonwealth's Attorney of Prince William County:

"Fat Ebert,

"What's up you fat head fucker? I'm just writing to tell you, since you want to kill me so Goddamn bad for killing your nigger loving whore, set up a court date closer than Oct. 25 so I can go ahead and get this bullshit over with and plead guilty so you can kill me and get it over with, unless you want to let me out so I can kill the rest of the nigger lovers and all the niggers, Jews, Spics and everybody else in this fucked up country that's not white. That includes you because you are a nigger loving Jewish fucking faggot. I will see you in hell bitch.

"your buddy,

"Paul Powell

"P.S. Watch your back!"

The jury viewed writings and drawings taken from Powell's jail cell that demonstrated his hatred of people who were not Caucasian. Additionally, the jury heard evidence that Powell told police officers that he was a racist and described his violent racial views. He stated, "[e]verybody that ain't white shouldn't-he needs to die." Powell had told a police officer that he wanted to purchase a gun to "[k]ill somebody. Kill a lot of somebodies ... [j]ust for something to do." The jury was aware of Powell's criminal record, including three convictions for contributing to the delinquency of a minor, two larceny convictions, and three felony convictions for abduction, rape, and attempted capital murder of Kristie.

IV.

Powell argues that his trial counsel were ineffective and that he was prejudiced because they failed to object to the admission of the NCIC form that contained an incorrect entry that Powell had a prior conviction for capital murder.

The United States Supreme Court, in *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), articulated the relevant principles that we must apply in the resolution of Powell's

claim. In *Strickland,* the Supreme Court stated:

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

Id. at 687, 104 S. Ct. 2052. *Accord Wiggins v. Smith,* 539 U.S. 510, 534, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003); *Lockhart v. Fretwell,* 506 U.S. 364, 369-70, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993); *Lenz v. Washington,* 444 F.3d 295, 302-03 (4th Cir. 2006); *Hedrick v. True,* 443 F.3d 342, 349 (4th Cir. 2006); *Vinson v. True,* 436 F.3d 412, 418 (4th Cir. 2005).

Explaining the two-part test enunciated in *Strickland,* the Supreme Court noted:

> "An error by counsel, even if professionally unreasonable, does not warrant setting aside the

> judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison,* 449 U.S. 361, 364-365 [101 S. Ct. 665, 66 L. Ed. 2d 564] (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."

Strickland, 466 U.S. at 691-92, 104 S. Ct. 2052.

As the Supreme Court has instructed, Powell is required to establish that trial counsel's alleged error, in this instance, the failure to object to the admission of evidence, resulted in prejudice to him. The Supreme Court stated in *Strickland:*

> "[A]ctual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.... Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense."

Id. at 693, 104 S. Ct. 2052.

The Supreme Court has also held that "a court need not determine whether counsel's performance was

deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* at 697, 104 S. Ct. 2052.

The United States Supreme Court has identified three "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic,* 466 U.S. 648, 658, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); *Bell v. Cone,* 535 U.S. 685, 695-96, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) ("[In *Cronic,*] we identified three situations implicating the right to counsel that involved circumstances 'so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' [*Cronic,* 466 U.S. at 658, 104 S. Ct. 2039]"). The United States Supreme Court held that a defect is presumptively prejudicial if (1) there has been a "complete denial of counsel" at "a critical stage" of the proceedings, *Cronic,* 466 U.S. at 659, 662, 104 S. Ct. 2039; or (2) "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," *id.* at 659, 104 S. Ct. 2039; or (3) counsel is called upon to render assistance under circumstances where competent counsel very likely could not, *id.* at 659-62, 104 S. Ct. 2039. *Bell,* 535 U.S. at 695-96, 122 S. Ct. 1843. The admission of the erroneous NCIC entry does not fall into one of these enumerated categories of error when prejudice is so likely to result that it

will be presumed. Accordingly, this Court must apply the *Strickland* test to determine whether the error was prejudicial.

The Supreme Court's decision in *Strickland* applies to cases in which a habeas petitioner has been sentenced to death and in *Strickland,* the Supreme Court discussed the standard that this Court must apply to determine whether Powell suffered prejudice:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.
>
> ....
>
> "When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.
>
> "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the

> errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."

Id. at 694-96, 104 S. Ct. 2052.

The Supreme Court stated in *Kimmelman v. Morrison,* 477 U.S. 365, 382, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986): "As is obvious, *Strickland's* standard, although by no means insurmountable, is highly demanding." *Accord Fitzgerald v. Thompson,* 943 F.2d 463, 468 (4th Cir. 1991).

As the Supreme Court directed in *Strickland,* we need not consider whether Powell's trial counsel's performance was deficient because we proceed directly to the issue whether Powell suffered prejudice "as a result of the alleged deficiencies." In determining whether Powell has established that there is a reasonable probability that but for trial counsel's errors, the result of the proceeding would

have been different, this Court must consider the "totality of the evidence before the ... jury." *Strickland,* 466 U.S. at 695, 104 S. Ct. 2052.

Powell complains about trial counsel's failure to object to an entry on the bottom of page three of the NCIC form. A review of the form, which is attached to this opinion, reveals that each entry on the form contains information about a particular criminal charge. Each entry contains the name and date of the offense charged with the statutory reference, an arrest date, the jurisdiction where the offense was charged, the resulting conviction if any, a date of disposition, and various codes.

Powell contends that he was prejudiced by trial counsel's failure to object to the entry on the bottom of page three of the form that incorrectly stated that Powell was convicted of capital murder. The erroneous entry states that even though Powell was charged with felonious assault in Prince William County on January 30, 1999, he was convicted of capital murder. This entry, which refers to Powell's attack on Kristie Reed, erroneously contains the phrase "capital murder" when it should have contained the phrase "attempted capital murder."

When introducing the NCIC report, the Commonwealth's Attorney accurately recited Powell's criminal record:

> "Your honor, as an initial matter, the Commonwealth would move for the introduction of

> the Certified Copy of the Defendant's prior criminal record consisting of two convictions in 1997 for contributing to the delinquency of a minor. One conviction in 1999 for that same crime. A petty larceny in 1998 and a grand larceny in 2001 along with the three felony convictions that is; rape, abduction with intent to defile and attempted capital murder involving Kristie."

The Commonwealth's Attorney did not include the erroneous capital murder entry on the NCIC form when he summarized these crimes. Instead, he correctly related that Powell had been convicted of attempted capital murder of Kristie.

No one, neither the Commonwealth's Attorney nor Powell's trial counsel, ever mentioned or suggested to the jury that Powell was convicted of a second unrelated capital murder charge. In fact, various statements made by Powell's trial counsel and the Commonwealth's Attorney informed the jury that Powell had never been convicted of an unrelated capital murder charge. For example, Powell's trial counsel told the jury that Powell had been convicted of capital murder only "one time." None of the attorneys referenced the incorrect capital murder conviction on the NCIC report in their arguments to the jury.

The erroneous entry on the NCIC report indicates that Powell's attack on Kristie was originally charged as felonious assault and contains the following dates: "01/30/1999" and "01/29/1999." The

jury that sentenced Powell to death knew, however, that "01/30/1999" was the date of Powell's arrest and "01/29/1999" was the date Powell committed the crimes against Stacey and Kristie Reed. The erroneous entry refers to "Prince William Co." and the jury knew that Prince William County was the location of Powell's crimes against Stacey and Kristie. Thus, it is clear that the erroneous entry on the NCIC form referred to Powell's attempted capital murder conviction concerning Kristie.

Upon our review of the totality of the evidence that the jury considered, "[t]aking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings," *Strickland,* 466 U.S. at 696, 104 S. Ct. 2052, we conclude that Powell has failed to demonstrate a reasonable probability that the result of the capital murder trial would have been different and hence he has not suffered prejudice as required by the highly demanding standard that the Supreme Court established in *Strickland.*[*]

---

[*] Contrary to the Supreme Court's instructions in *Strickland,* the dissent focuses solely upon the improperly admitted evidence and does not consider the totality of the evidence before the jury. The dissent argues that we have usurped the jury's "very broad discretion" and engaged in "speculation" by considering the weight of the Commonwealth's evidence against Powell. However, in order to perform the review mandated by *Strickland,* we must weigh the evidence to determine whether there is a reasonable probability that the error affected the outcome of the proceedings. *Wiggins,* 539 U.S. at 534, 123 S. Ct. 2527; *Yarbrough v. Warden,* 269 Va. 184, 197-202, 609 S.E.2d 30, 38-40 (2005); *Lovitt v. Warden,* 266 Va. 216, 250-57, 585 S.E.2d 801, 821-26 (2003).

Code § 19.2-264.2 prescribes the conditions that must be satisfied before a jury can impose the sentence of death in Virginia:

> "In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed."

The jury that imposed the sentence of death upon Powell concluded:

> "We, the jury, on the issue joined, having found the defendant, PAUL WARNER POWEL [sic], guilty of capital murder in that he did willfully, deliberately, and premeditatively kill and murder one Stacey Lynn Reed, and, having found unanimously and beyond a reasonable doubt after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society and having found unanimously

> and beyond a reasonable doubt that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved ... [d]epravity of mind ... [a]ggravated battery to the victim beyond the minimum necessary to accomplish the act of murder [a]nd having considered all the evidence in mitigation of the offense, unanimously fixed his punishment at death."

The day before Powell committed these gruesome crimes, he went to the victims' home and surveyed the interior of the house. He returned the next day and tried to rape Stacey, who struggled with him. He stabbed her in the heart, twisted the knife, and reinserted the knife in her heart. He stomped upon her throat and he placed the entire weight of his body on her throat until she died. Next, he drank a glass of iced tea, smoked a cigarette, and waited for Stacey's younger 14-year-old sister to return home. When Kristie arrived, Powell directed her to her sister's body, forced her downstairs into the basement, and raped her on the floor. He then tied her hands and feet while she was naked, choked her until she was unconscious, stabbed her in the stomach, and slashed her neck numerous times in an attempt to kill her.

We conclude that the jury's finding that Powell's conduct was "outrageously or wantonly vile, horrible or inhuman in that it involved ... [d]epravity of mind [and] ... [a]ggravated battery to the victim beyond the minimum necessary to accomplish the act of

murder" is untainted by the admission of the NCIC report and amply supported. The jury's consideration of Powell's past criminal offenses is related to the issue of future dangerousness but has nothing to do with vileness of the act which serves as the basis of the capital offense. The instruction given to the jury on this issue and the verdict form confirm that the jury was instructed to consider the defendant's criminal history only with regard to future dangerousness. For example, the jury was instructed that it could fix the punishment at death if it found:

"1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or

"2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder."

Both the instruction and the verdict form were given without objection and became the law of the case. *Spencer v. Commonwealth,* 240 Va. 78, 89, 393 S.E.2d 609, 616 (1990). Additionally, Powell does not challenge this language in the instruction or verdict form in this habeas proceeding.

We also observe that Powell's own statements provided compelling evidence of his future

dangerousness. Powell's letters and confessions to police demonstrate that he planned to kill the victims' entire family and that he continued to taunt the victims' family even while he was incarcerated awaiting his capital murder trial by sending the victims' mother a photograph of a partially-nude woman who resembled the deceased victim. Powell also sought to intimidate Kristie by having another individual contact her by telephone and tell her that she would be killed if she testified against Powell. He also bragged about his desire to kill people who are non-Caucasian.

As the Supreme Court instructed in *Strickland,* "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." 466 U.S. at 696, 104 S. Ct. 2052. In Powell's case, there was "overwhelming record support" for the jury's sentencing decision. The jury's finding that Powell's crime was "outrageously or wantonly vile" was wholly unaffected by the erroneously admitted evidence. Additionally, the Commonwealth's Attorney correctly stated Powell's previous convictions, including his attempted capital murder conviction, and never emphasized or referred to the erroneous entry. "Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings," we hold that Powell has not "met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.*

Upon our review of the totality of the evidence that Powell constitutes a continuing serious threat to society and that his acts were vile in that he committed an aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and that he demonstrated depravity of mind, we conclude that Powell failed to satisfy the high standard of prejudice established by the Supreme Court's holding in *Strickland*. Accordingly, we will dismiss the petition for habeas corpus.

Dismissed.

Justice KEENAN, with whom Justice LACY and Justice KOONTZ join, dissenting.

Exhibit 51

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0115 95579 1119
  NCIC REPLY

/AD750013A
THIS INTERSTATE IDENTIFICATION INDEX RESPONSE IS THE RESULT OF YOUR
RECORD REQUEST FOR FBI/964411FB9. THE RECORD MAY BE OBTAINED FROM
FILES WITHIN YOUR STATE. THE INTERSTATE IDENTIFICATION INDEX CONTAINS
NO ADDITIONAL DATA.
END

FRI 95580 IN: NC21 4361 AT 15JAN2003 11:18 OUT: FWCA 76 AT 15JAN2003 11:19



0115 95579 1119
/CIR REPLY

/AD750013A

THE FOLLOWING RECORD PERTAINS TO FBI/964411FB9.

                              VIRGINIA CRIMINAL RECORD          01/15/2003 PART 1

SID: VA11202922 FBI: 964411FB9

NAMES RECORDED IN VIRGINIA FILES                          SEX RACE DATE OF BIRTH
       POWELL          PAUL          WARNER                M   W   04/13/1978

HEIGHT  WEIGHT  EYES  HAIR  SCARS/MARKS/TATTOOS
5'10"   150     BRO   BRO   T/ALL OVER BODY

LAST REPORTED ADDRESS:  PRISONER OF STATE OF VIRGINIA
                        N/A, UU

PLACE OF BIRTH: FALLS CHURCH

SOCIAL SECURITY NO(S): 230-15-4762

                    ************************************
                    *        =>CONVICTED FELON<=       *
                    *      FELONY CONVICTIONS:   6     *
                    ************************************

CONTRIBUTOR/CASE    DATE        CHARGE/DISPOSITION
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PD MANASSAS VA      05/28/1997  01/CHARGED WITH          MISDMNR
ORI:VA0750100                   CONTRIBUTE TO THE DELINQUENCY O
OCA:97003473                    MANASSAS                  05/28/199
PRINCE WM CO JDR CT 08/06/1997      NOLLE PROSSED
ORI:VA0750033
SCN:NOT RECORDED
OCN:H410241                     1735/0751   1820/1123
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PD MANASSAS VA      05/28/1997  02/CHARGED WITH          MISDMNR
ORI:VA0750100                   CONTRIBUTE TO THE DELINQUENCY
OCA:97003473                    MANASSAS                  05/28/199
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EXHIBIT NO. 51
PL( ) DEF( ) COM
CASE NO. CR-51813
DATE 1-15-03
JUDGE:

BEST AVAILABLE COPY

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PRINCE WM CO JDR CT 08/06/1997    GUILTY              MISDMNR
ORI:VA075023J                     CONTRIBUTING TO MINOR
CCN:NOT RECORDED
DCN:H610243                       1735/0752   1820/1124
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PD MANASSAS VA      05/28/1997    03/CHARGED WITH     MISDMNR
ORI:VA0750100                     CONTRIBUTE TO THE DELINQUENCY OF A MINOR
OCA:97003473                      MANASSAS            05/28/1997
PRINCE WM CO JDR CT 08/06/1997    GUILTY              MISDMNR
ORI:VA075023J                     CONTRIBUTING TO MINOR
CCN:NOT RECORDED
DCN:H610244                       1735/0753   1820/1125
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PD PRINCE WM CO VA  12/21/1997    01/CHARGED WITH     MISDMNR
ORI:VA0750300                     CONTRIBUTING TO DELINQUENCY OF MINOR
OCA:97199686                      PRINCE WILLIAM CO   12/21/1997
PRINCE WM CO JDR CT 10/28/1998    GUILTY              MISDMNR
ORI:VA075023J                     CONTRIBUTE TO DELINQUENCY OF A MINOR
CCN:NOT RECORDED
DCN:H388804                       1905/1079   2025/1471
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PD PRINCE WM CO VA  12/21/1997    02/CHARGED WITH     MISDMNR
ORI:VA0750300                     UNLAWFUL ENTRY
OCA:97199686                      PRINCE WILLIAM CO   12/21/1997
PRINCE WM GEN DIST  07/07/1998    NOLLE PROSSED
ORI:VA075013J
CCN:NOT RECORDED
DCN:H388805                       1905/1080   2029/0979
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PD PRINCE WM CO VA  01/07/1998    01/CHARGED WITH     FELONY
ORI:VA0750300                     STATUTORY BURGLARY
OCA:97196665                      PRINCE WILLIAM CO   12/15/1997
PRINCE WM CIRCUIT   05/18/1998    NOLLE PROSSED
ORI:VA075015J
CCN:NOT RECORDED
DCN:H546846                       1905/0658   2029/1045
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PD PRINCE WM CO VA  01/07/1998    02/CHARGED WITH     FELONY
ORI:VA0750300                     LARCENY
OCA:97196665                      PRINCE WILLIAM CO   12/15/1997
PRINCE WM CIRCUIT   05/18/1998    GUILTY              MISDMNR
ORI:VA075015J                     LARCENY
CCN:NOT RECORDED
DCN:H546847                       1905/0657   2029/1054
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PD PRINCE WM CO VA  01/09/1998    01/CHARGED WITH     FELONY
ORI:VA0750300                     LARCENY
OCA:97197191                      PRINCE WILLIAM CO   12/16/1997
PRINCE WM GEN DIST  02/25/1998    NOLLE PROSSED
ORI:VA075013J
CCN:NOT RECORDED
DCN:H546872                       1905/0656   1933/0544
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PD PRINCE WM CO VA  01/09/1998    02/CHARGED WITH     FELONY
ORI:VA0750300                     STATUTORY BURGLARY
OCA:97197191                      PRINCE WILLIAM CO   12/16/1997
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PRINCE WM GEN DIST  02/25/1998    NOLLE PROSSED
ORI:VA0750133
CCN:NOT RECORDED
DCN:M546873                       1905/0655   1932/0563
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PD PRINCE WM CO VA  01/30/1999 01/CHARGED WITH        FELONY 18.2-32
ORI:VA0750300                  MURDER
OCA:9910362                    PRINCE WILLIAM CO     01/29/1999  PHOTO:Y
PRINCE WM CIRCUIT   05/03/1999 ==>GUILTY             FELONY 18.2-31
ORI:VA075015J                  CAPITAL MURDER
CCN:NOT RECORDED
DCN:P906051                    2193/1527   2634/2385
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PD PRINCE WM CO VA  01/30/1999 02/CHARGED WITH        FELONY 18.2-95
ORI:VA0750300                  GRAND LARCENY
OCA:9910362                    PRINCE WILLIAM CO     01/27/1999  PHOTO:Y
PRINCE WM CIRCUIT   08/10/2000 ==>GUILTY             FELONY 18.2-95
ORI:VA075015J                  GRAND LARCENY
CCN:NOT RECORDED
DCN:P906052                    2193/1527   2634/2386
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PD PRINCE WM CO VA  01/30/1999 03/CHARGED WITH        FELONY 18.2-53.1
ORI:VA0750300                  USE OR DISPLAY FIREARM IN COMMISSION OF FELONY
OCA:9910362                    PRINCE WILLIAM CO     01/29/1999  PHOTO:Y
PRINCE WM CIRCUIT   05/05/2000    NOT GUILTY
ORI:VA075015J
CCN:NOT RECORDED
DCN:P906053                    2193/1527   2638/0810
-------------------
PD PRINCE WM CO VA  01/30/1999 04/CHARGED WITH        FELONY 18.2-53.1
ORI:VA0750300                  USE OR DISPLAY FIREARM IN COMMISSION OF FELONY
OCA:9910362                    PRINCE WILLIAM CO     01/29/1999  PHOTO:Y
PRINCE WM CIRCUIT   05/05/2000    NOT GUILTY
ORI:VA075015J
CCN:NOT RECORDED
DCN:P906054                    2193/1527   2638/0808
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PD PRINCE WM CO VA  01/30/1999 05/CHARGED WITH        FELONY 18.2-53.1
ORI:VA0750300                  USE OR DISPLAY FIREARM IN COMMISSION OF FELONY
OCA:9910362                    PRINCE WILLIAM CO     01/29/1999  PHOTO:Y
PRINCE WM CIRCUIT   05/05/2000    NOT GUILTY
ORI:VA075015J
CCN:NOT RECORDED
DCN:P906055                    2193/1527   2638/0809
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PD PRINCE WM CO VA  01/30/1999 06/CHARGED WITH        FELONY 18.2-47
ORI:VA0750300                  ABDUCTION & KIDNAPPING
OCA:9910362                    PRINCE WILLIAM CO     01/29/1999  PHOTO:Y
PRINCE WM CIRCUIT   08/10/2000 ==>GUILTY             FELONY 18.2-48
ORI:VA075015J                  ABDUCTION -EXTORT MONEY OR IMMORAL PURPOSE
CCN:NOT RECORDED
DCN:P906056                    2193/1527   2634/2388
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PD PRINCE WM CO VA  01/30/1999 07/CHARGED WITH        FELONY 18.2-51
ORI:VA0750300                  FELONIOUS ASSAULT
OCA:9910362                    PRINCE WILLIAM CO     01/29/1999  PHOTO:Y
PRINCE WM CIRCUIT   08/10/2000 ==>GUILTY             FELONY 18.2-31
ORI:VA075015J                  CAPITAL MURDER
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CCN:NOT RECORDED
DCN:P906057 2193/1527 2634/2387

PD PRINCE WM CO VA 01/30/1999 08/CHARGED WITH FELONY 18.2-61
ORI:VA0750300 RAPE
OCA:9910362 PRINCE WILLIAM CO 01/29/1999 PHOTO:Y
PRINCE WM CIRCUIT 08/10/2000 ==>GUILTY FELONY 18.2-61
ORI:VA075015J RAPE
CCN:NOT RECORDED
DCN:P906058 2193/1527 2634/1721

PD PRINCE WM CO VA 01/30/1999 09/CHARGED WITH FELONY 18.2-181
ORI:VA0750300 ISSUING BAD CHECKS >=$200
OCA:9910362 PRINCE WILLIAM CO 10/08/1998 PHOTO:Y
PRINCE WM CIRCUIT 09/02/1999 ==>GUILTY FELONY
ORI:VA075015J BAD CHECK
CCN:NOT RECORDED
DCN:P906059 2193/1525 2336/1946

PD PRINCE WM CO VA 01/30/1999 10/CHARGED WITH MISDEM 18.2-181
ORI:VA0750300 ISSUING BAD CHECKS <$200
OCA:9910362 PRINCE WILLIAM CO 10/07/1998 PHOTO:Y
PRINCE WM GEN DIST 09/02/1999 NOLLE PROSEQ
ORI:VA075013J
CCN:NOT RECORDED
DCN:P906060 2193/1535 2336/1941

PD PRINCE WM CO VA 05/05/1999 01/CHARGED WITH FELONY 18.2-26
ORI:VA0750300 ATTEMPT TO CONSPIR NONCAPITAL OFFENSE
OCA:9916038 PRINCE WILLIAM CO 01/29/1999
PRINCE WM CIRCUIT 05/05/2000 NOT GUILTY
ORI:VA075015J
CCN:NOT RECORDED
DCN:H977002 2301/0829 2638/1367

PD PRINCE WM CO VA 05/05/1999 02/CHARGED WITH FELONY 18.2-58
ORI:VA0750300 ROBBERY
OCA:9916038 PRINCE WILLIAM CO 01/29/1999
PRINCE WM CIRCUIT 05/05/2000 NOT GUILTY
ORI:VA075015J
CCN:NOT RECORDED
DCN:H977005 2301/0828 2638/1366

PD PRINCE WM CO VA 12/07/2001 01/CHARGED WITH FELONY 18.2-31
ORI:VA0750300 CAPITAL MURDER
OCA:9916038 PRINCE WILLIAM CO 01/29/1999
********** DISPOSITION NOT RECEIVED
DCN:524787A 2895/1093

RECORD AUTOMATED: 07/08/1997 LAST RECORD UPDATE: 01/17/2002

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Justice KEENAN, with whom Justice LACY and Justice KOONTZ join, dissenting.

I respectfully dissent and would hold that Powell is entitled to a new sentencing hearing. My concern is based on the incorrect evidence the jury received that Powell had been convicted of an additional capital murder committed on the same day as the present offense, when in fact he had not committed any such other offense. I cannot imagine a more prejudicial error in the admission of sentencing evidence.

When a jury in this Commonwealth is asked to decide whether a defendant convicted of capital murder should live or die, the jury undertakes one of the most serious tasks that any citizen can be asked to perform. An essential component of this decision is the jury's consideration of the defendant's criminal record.

Under Code § 19.2-264.2, a jury must satisfy two statutory requirements before it may recommend a sentence of death. Ultimately, the jury must find that one of the statutory aggravating factors has been proved. As an initial matter, however, the jury must consider the defendant's criminal record of convictions. Code § 19.2-264.2 requires that the jury analyze the statutory aggravating factors only "after consideration of the past criminal record of convictions of the defendant." Thus, a review of the defendant's criminal history is a prerequisite that applies regardless of which aggravating factor may

finally be proved.

Here, the sentencing proceedings conducted by the circuit court failed to comply with the first requirement of Code § 19.2-264.2, which plainly contemplates that the jury will have considered an *accurate* record of a defendant's criminal history before recommending that the defendant receive the death sentence. Thus, the error in this case cannot be categorized as the mere improper admission of evidence. Because of this failure in the sentencing process, the jury was unable to perform a mandatory duty assigned by statute.

In my opinion, the majority's holding further suffers from extensive speculation and a failure to address the broad discretion afforded a jury in making a death penalty determination. Even when a jury has determined that the Commonwealth has proved both statutory aggravating factors beyond a reasonable doubt, the jury still can recommend that the defendant serve a sentence of life imprisonment. *See* Code §§ 19.2-264.2, -264.4; *Smith v. Commonwealth,* 219 Va. 455, 472, 248 S.E.2d 135, 145 (1978); *see also Tuggle v. Thompson,* 57 F.3d 1356, 1371 (4th Cir.), vacated on other grounds by *Tuggle v. Netherland,* 516 U.S. 10, 116 S. Ct. 283, 133 L. Ed. 2d 251 (1995); *Briley v. Bass,* 750 F.2d 1238, 1241 (4th Cir. 1984). The jury may impose a sentence of life imprisonment for any reason based on any mitigating circumstance, and is not required to weigh the evidence in mitigation against the evidence in aggravation of the crime. *See Swann v. Commonwealth,* 247 Va. 222,

236-37, 441 S.E.2d 195, 205 (1994); *see also Tuggle,* 57 F.3d at 1362. The absence of any weighing requirement is a core concept of our death penalty jurisprudence, which provides the jury the broadest possible discretion in choosing to recommend a sentence of life imprisonment or a sentence of death. Thus, the two main arguments on which the majority relies, namely, the weight of the Commonwealth's evidence against Powell, and the jury's determination that the Commonwealth proved both statutory aggravating factors, are not dispositive of the issue before us.

A jury's exercise of this very broad sentencing discretion is particularly difficult to assess under the *Strickland* test because the jury can sentence a defendant to life imprisonment even in the face of overwhelming evidence in aggravation of a crime. Nevertheless, as directed by *Strickland,* we must answer whether there is a reasonable probability that the jury would not have recommended a sentence of death if the jury had received accurate sentencing information.

The Supreme Court provided guidance in *Strickland* when it defined the term "reasonable probability." The Court stated: "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S. Ct. 2052; *see Lovitt v. Warden,* 266 Va. 216, 250, 585 S.E.2d 801, 821 (2003); *Hedrick v. Warden,* 264 Va. 486, 497, 570 S.E.2d 840, 847 (2002). The Court has further elaborated that the reasonable probability

standard is a standard lower than "more likely than not." *See Holland v. Jackson,* 542 U.S. 649, 654, 124 S. Ct. 2736, 159 L. Ed. 2d 683 (2004); *Woodford v. Visciotti,* 537 U.S. 19, 22, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

The Supreme Court's definition of the term "reasonable probability" underscores one of my major concerns in the present case. In my view, a court cannot have confidence in the outcome of a death penalty determination when the court's *Strickland* analysis relies on speculation. Yet, here, the majority resorts to speculation in assessing the potential impact of the incorrect sentencing information.

The majority opines that the jury ultimately would have been able to determine that the additional capital murder conviction shown on the NCIC report was an erroneous entry. Although the majority, as skilled members of the legal profession, can easily identify this inaccuracy, the majority simply speculates that the jurors had sufficient knowledge of the law to reach the same conclusion. Based on the evidence presented, the jurors could easily have viewed the NCIC report as proof that Powell committed a separate capital offense in Prince William County on the same day, brutally murdering an additional victim.

The majority also suggests that because the prosecutor did not reference the incorrect sentencing information when he summarized the contents of the NCIC report at the time of its admission into

evidence, his oral summary of Powell's crimes would likely have resolved any confusion created by the erroneous written exhibit. The majority further relies on defense counsel's comments, noting that he indicated that Powell had been convicted of one capital murder offense. The majority's reasoning, however, is flawed because it requires an assumption that the jury disregarded the instructions of the circuit court. In every jury trial in this Commonwealth, the court instructs the jury that the statements of counsel are not evidence in the case and may not be considered as such. Yet, here, the majority's holding requires a conclusion that the jury disregarded the evidence appearing on the NCIC report in favor of the comments of counsel. Thus, the majority's rationale extends beyond simple speculation and also requires an improper conclusion that the jury rejected duly admitted evidence in favor of counsels' remarks.

Because a *Strickland* analysis cannot rest on such speculation and improper assumptions, I am required to conclude that the jury viewed the NCIC report as uncontested evidence that Powell had committed another capital murder. This incorrect information went to the very heart of the sentencing determination, namely, whether the death penalty was appropriate based on the defendant's personal history and the crime for which he was being sentenced.

I would hold that the jury's receipt of incorrect information of such magnitude negates any

reasonable confidence in the outcome of Powell's sentencing proceeding. My concerns, however, reach far beyond the present case.

In my opinion, such a serious mistake in a capital murder case may well cause the public to question whether our courts adequately ensure the fair application of our death penalty statutes. When a jury has determined that a defendant should die for the commission of a heinous murder, the public should be able to have confidence that this determination was made without fundamental errors having occurred in the sentencing process. A central premise in support of the death penalty is that society exacts this penalty only in rare instances, and only after the penalty has been determined with full and fair adherence to constitutional, statutory, and evidentiary safeguards. Because those safeguards failed in this case when a very able prosecutor made an unintentional error, I would grant a writ of habeas corpus limited to the award of a new sentencing proceeding.

Appendix D

Supreme Court of Virginia.
Paul Warner POWELL
v.
COMMONWEALTH of Virginia.
Record No. 031421.

Jan. 16, 2004.

OPINION BY Justice LAWRENCE L. KOONTZ, JR.

In this appeal, we review the capital murder conviction and sentence of death imposed upon Paul Warner Powell for the murder of Stacey Lynn Reed in the commission of, or subsequent to, attempted rape. Code § 18.2-31(5).

I. BACKGROUND

A. Powell's First Trial and Appeal

Powell was originally convicted of the capital murder of Stacey Lynn Reed in 2000 and sentenced to death. *See Powell v. Commonwealth,* 261 Va. 512, 530, 552 S.E.2d 344, 354 (2001). In the same trial, Powell was convicted of the abduction, rape, and attempted capital murder of Stacey's younger sister, Kristie Erin Reed, and was sentenced to three terms of life imprisonment and fines totaling $200,000 for those crimes.[1] *Id.*

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[1] The abduction, rape, and attempted capital murder convictions, as well as a conviction for grand larceny, were

Upon review of the capital murder conviction and the death sentence imposed upon Powell, this Court reversed the conviction on various grounds including a finding that the indictment charging Powell with capital murder in the commission of robbery and/or attempted robbery had been improperly amended to include a charge of capital murder "during the commission of or subsequent to rape and/or attempted rape and/or sodomy and/or attempted sodomy."[2] *Id.* at 532, 552 S.E.2d at 355-56. Upon review of the record, we further held that the wording of the indictment limited the Commonwealth to proving that the "gradation crime was a rape occurring before or during the killing," *id.* at 538-39, 552 S.E.2d at 359, and there was "no evidence upon which the jury could have found that Powell committed the rape of Kristie before or during the murder of Stacey." *Id.* at 541, 535 S.E.2d at 361.

We summarized the consequence of these holdings in the conclusion of the opinion, stating:

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affirmed in the prior appeal and are not at issue in this appeal. Powell had also been tried for robbery and attempted robbery, Code § 18.2-58, and three counts of use of a firearm, Code § 18.2-53.1. He was acquitted of those crimes.

[2] Following the presentation of the Commonwealth's case-in-chief in Powell's first trial, the Commonwealth had conceded that there was no evidence of forcible sodomy or attempted forcible sodomy against Kristie. *Powell,* 261 Va. at 525, 552 S.E.2d at 351. Thus, that aspect of the amended indictment for capital murder from Powell's first trial is not relevant to any issue raised in this appeal.

there is simply no evidence upon which the jury could have relied to find that Powell committed or attempted to commit any sexual assault against Stacey before or during her murder, or that the rape of Kristie did not occur after the murder of her sister. Accordingly, under the circumstances of this case, the evidence at best would have supported a conviction for first degree murder.

For these reasons, we will reverse Powell's conviction for capital murder ... and remand the case for a new trial on a charge of no greater than first degree murder for the killing of Stacey Reed, if the Commonwealth be so advised.

Id. at 545-46, 552 S.E.2d at 363

The mandate from this Court to the trial court tracked the language of the opinion, and directed that "the case is remanded ... for a new trial on a charge of no greater than first degree murder for the killing of Stacey Reed, if the Commonwealth be so advised."

B. Events and Proceedings Following Remand

Powell's Letter

On October 21, 2001, Powell wrote an obscenity-laced letter to the Commonwealth's Attorney who had prosecuted Powell in his first trial.[3] Powell

[3] Powell had previously written to the Commonwealth's

stated in the letter that, because he believed he could not be retried for capital murder, "I figured I would tell you the rest of what happened on Jan. 29, 1999, to show you how stupid all y'all ... are." Admitting that he "planned to kill the whole family" on that day, Powell further stated that "I had other plans for [Stacey] before she died." Powell described how he had attempted to initiate consensual sexual intercourse with Stacey, which he had previously admitted. Powell then revealed that when Stacey resisted his advances, he pushed her onto her bed and, while sitting on top of her, told Stacey "that we could do it the easy way or the hard way."

Powell then described how Stacey had "started fighting with me and clawed me [sic] face." Powell stated that he "slammed her to the floor ... sat on top of her and pinned her hands down again." Powell claimed that Stacey relented "and I told her if she tried fighting with me again I would kill her."

Continuing, Powell stated that, at his direction, Stacey began to disrobe, but stopped when the telephone rang. Stacey put her clothes back on so that she could answer the telephone. Powell refused to allow Stacey to answer the telephone and ordered her to resume disrobing. When she refused, Powell "pushed her back and pulled out [his] knife." When Stacey attempted to leave the bedroom, Powell stabbed her. Stacey fell back and Powell removed the

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Attorney on July 4, 2001, proposing a plea agreement for a first degree murder charge for the killing of Stacey Reed.

knife. Stacey then stumbled to another bedroom and collapsed. Powell "saw that she was still breathing" and "started stomping on her throat" until he "didn't see her breathing anymore."

The New Indictment

Armed with this new evidence, the Commonwealth elected to nolle prosequi the indictment in the remanded case, under which it was limited to trying Powell for first degree murder under our mandate, and sought a new indictment against Powell for capital murder. On December 3, 2001, the grand jury returned an indictment charging Powell with the capital murder of "Stacey Lynn Reed during the commission of or subsequent to the attempted rape of Stacey Lynn Reed."

C. Powell's Second Trial

Motions to Dismiss the Indictment

On April 24, 2002, Powell filed a motion to dismiss the December 3, 2001 indictment. Powell asserted that "[w]hen the Supreme Court of Virginia issues an opinion concerning a case, this opinion becomes the law of the case" and, thus, the directive of the opinion and mandate from this Court in his first appeal limited his retrial to a charge no greater than first degree murder, regardless whether that trial was conducted under the original indictment or a new indictment. The Commonwealth filed a response to this motion, asserting that the judgment of this

Court in Powell's first appeal was not applicable to the December 3, 2001 indictment because Powell had "never [previously] been charged with the capital murder of Stacey Reed in the commission or attempted commission [of] sexual assault against [Stacey Reed] because, at the time of [Powell's first] trial, no such evidence existed." Accordingly, the Commonwealth contended that the December 3, 2001 indictment was "a new charge, one that has never been litigated in trial nor considered by the Virginia Supreme Court." Following a hearing on this and other pre-trial matters, the trial court overruled Powell's motion to dismiss the indictment in an order dated May 6, 2002.

On May 17, 2002, Powell filed a second motion to dismiss the December 3, 2001 indictment. The briefs filed in the trial court in support of and in opposition to this motion parallel the arguments made on appeal with respect to this issue and, accordingly, we will only summarize the essential points of those arguments here. The import of Powell's argument was that his prior trial and the reversal of his conviction by this Court acted as an "implied" or "judicial" acquittal of the attempted rape of Stacey, thus barring his retrial for her capital murder premised on that gradation offense. The Commonwealth responded that the issue whether Stacey had been the victim of a sexual assault was not before the jury in his first trial because the bill of particulars provided at Powell's request indicated that only Kristie was the victim of the sexual assault gradation offenses charged in the amended

indictment. Similarly, the Commonwealth contended that our comments concerning the insufficiency of the evidence to prove a sexual assault or attempted sexual assault against Stacey were not directed toward any finding of the jury, but to the contrary were indicative of the fact that the jury did not consider whether Stacey had been the victim of such an assault or attempt.

On June 5, 2002, the trial court held a hearing on Powell's second motion to dismiss the indictment. After hearing argument, the trial court stated that by identifying Kristie as the victim of the rape or attempted rape in the bill of particulars, the Commonwealth had clearly identified her as the victim of those gradation crimes in the amended indictment for capital murder. The trial court also agreed with the Commonwealth that this Court's reference to the lack of evidence to prove any sexual assault or attempted sexual assault against Stacey was merely a comment on the record, and not an assertion that this was a theory of the case presented by the Commonwealth in Powell's first trial. On July 3, 2002, the trial court entered an order overruling Powell's second motion to dismiss the indictment.

Other Pre-trial Motions

On April 25, 2002, Powell filed a motion to have Virginia's statutory scheme for charging a capital crime and imposing a death sentence declared unconstitutional on various grounds. On appeal, Powell reasserts only some of these arguments and

does so only in summary fashion. Accordingly, we will not summarize those arguments in detail here, but will address them within the discussion of the relevant assignment of error, *infra*.

On April 26, 2002, Powell filed a motion seeking to have the Commonwealth's Attorney's office disqualified from prosecuting his case. Powell contended that the Commonwealth's Attorney had a conflict of interest because he was a key "chain of custody witness" with respect to his receipt of Powell's October 21, 2001 letter "confession" to the attempted rape of Stacey. Powell further contended that the offensive nature of that letter and his other conduct toward the Commonwealth's Attorney had created such a level of animosity that the Commonwealth's Attorney would not be able to objectively pursue justice, but would instead seek to satisfy a personal vendetta against Powell. Powell further contended that this taint of bias extended to every attorney in the Commonwealth's Attorney's office, and further asserted that these attorneys would be potential witnesses called to give testimony concerning the Commonwealth's Attorney's personal animus against Powell.[4]

On May 1, 2002, the Commonwealth filed responses

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[4] Powell further contended that one of the Assistant Commonwealth's Attorneys while in private practice had represented Powell in an unrelated criminal matter and, thus, had a conflict of interest. Powell does not reassert this issue on appeal.

to Powell's motions to have Virginia's statutory scheme for charging a capital crime and imposing a death sentence declared unconstitutional and to disqualify the Commonwealth's Attorney's office. With respect to the former, the Commonwealth asserted that all the issues raised therein had previously been considered and rejected by this Court, and there was no cause for the trial court to revisit them. As to the latter, the Commonwealth asserted that there was no evidence of bias on the part of the Commonwealth's Attorney or other members of his office and denied that there was any such bias, that the manner of establishing the chain of custody of Powell's letter was not the defense's concern, and that the questions of an appearance of impropriety should be raised through a disciplinary complaint proceeding.

On May 6, 2002, in the same hearing in which the trial court heard argument of Powell's first motion to dismiss the indictment, the trial court also heard argument on Powell's motions to have Virginia's statutory scheme for charging a capital crime and imposing a death sentence declared unconstitutional and to disqualify the Commonwealth's Attorney's office from prosecuting the case. Following that hearing, the trial court entered an order overruling these motions without comment.

On December 11, 2002, Powell filed a motion to exclude any evidence concerning his abduction, rape, and attempted murder of Kristie Reed from his trial. Powell contended that because he was charged only

with the capital murder of Stacey Reed predicated on an attempted rape of her, evidence of his subsequent attack on Kristie was irrelevant or that any probative value it might have would be overborne by its unduly prejudicial effect on the jury. The Commonwealth did not file a response to this motion, but during oral argument in a hearing held December 23, 2002, the Commonwealth asserted that evidence concerning the attack on Kristie was part of a continuing criminal enterprise and was relevant to show Powell's motive and intent in attempting the rape of Stacey.

Also on December 11, 2002, Powell, alleging that the United States Supreme Court's decision in *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002) had called into question prior judgments of this Court concerning the issue, filed a motion seeking to have Code § 19.2-264.4(B) declared unconstitutional because it permits a jury to consider evidence relating to the future dangerousness and vileness aggravating factors without full protection of due process to the defendant to confront witnesses. Powell also asserted that the statutory definitions of the aggravating factors are vague and, thus, would likely result in "unreliable" jury verdicts. The Commonwealth filed a brief in response to this motion, asserting that the issue of the constitutionality of Code § 19.2-264.4(B) is settled law.

On December 16, 2002, Powell filed a motion to suppress various statements he made to police

during the initial investigation of the crimes. Powell alleged that after giving an initial statement following waiver of his *Miranda* rights, he advised police that he had nothing more to say. Thereafter, Powell contended, any statement he made to police without a readvisement and waiver of his *Miranda* rights should be suppressed. The Commonwealth responded that the suppression issue had been decided in Powell's first trial and, thus, the doctrine of res judicata barred consideration of the issue in his second trial.[5] Powell filed a supplemental motion on December 17, 2002 asserting that a statement taken by an investigator on November 2, 2001, while Powell was in prison following his first trial, should be suppressed because his counsel was not present. The Commonwealth responded that Powell had been advised of and waived his *Miranda* rights prior to giving this statement and that he was not entitled to counsel under the Sixth Amendment at that time because he had not yet been indicted for the offense for which he was then on trial, and the formal proceedings on the prior indictments had concluded.

In summarizing its rulings on these motions during the December 23, 2002 hearing, the trial court stated that it found Powell had waived his *Miranda* rights with respect to the statement made after his first trial but prior to the bringing of the second indictment and, thus, the statement was not barred by either the Fifth or Sixth Amendments. The trial

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[5] Powell did not contest the trial court's failure to suppress his statements in the appeal of his first conviction.

court also indicated that it would deny the motion to suppress the statements from the initial investigation of the crimes, incorporating by reference the finding made during the first trial with respect to those statements. The trial court further found that evidence of Powell's attack on Kristie was admissible as being part of a common scheme and to show consciousness of guilt. The trial court entered an omnibus order denying all these motions as well as the motion challenging the constitutionality of Code § 19.2-264.4(B).

Jury Voir Dire

Powell's second trial commenced on January 13, 2003. The trial court conducted voir dire of the venire in panels of five potential jurors. In questioning the first panel, the trial court inquired whether "any of you have acquired any information about the alleged offense, or of the accused from the news media, or other sources in this particular matter?" The five panel members indicated that they had not. The Commonwealth further inquired whether "[i]f during the course of trial you should hear something which would jog your memory about the publicity, would you be able to set that aside and render your verdict based solely on what you hear in the courtroom?" The five panel members each indicated that they could do so.

During his voir dire of the first panel, Powell's counsel attempted to ask the following question:

> You're going to hear in this case that the Defendant has already been tried and convicted of capital murder at one point, and he's serving life sentences for other crimes. You're also going to hear that the Supreme Court of Virginia overturned the-

At this point, the Commonwealth objected and during a bench conference, referencing *Barker v. Commonwealth,* 230 Va. 370, 375, 337 S.E.2d 729, 733 (1985), asserted that, as the panel had already indicated that they had not heard of the case previously, Powell's counsel's question concerning the prior trial and appeal "may, in fact, taint" the members of the panel and disqualify them from serving on the jury. Powell's counsel responded that because the evidence would disclose the fact of his prior convictions and the reversal of his capital murder conviction and death sentence on appeal, the prohibition of *Barker* did not apply. He further contended that because a jury's knowledge of a prior conviction was potentially prejudicial to the defendant, it was a "tactical decision that we've made ... and we wish this evidence to come forward." Thus, he contended that it was proper to explore the potential jurors' bias that would result from hearing that evidence.

The trial court ruled, even though it agreed that this was a "unique case" because the evidence would establish the fact of the prior conviction and appellate reversal, "the *Barker* case is still good law." Accordingly, the trial court concluded that "we have to start off with a jury that does not have" knowledge

of the prior trial, conviction, and appeal. Accordingly, the trial court ruled that Powell could not question the jurors about their potential bias based upon such evidence being likely to be presented during the trial.

The Commonwealth then inquired, "Are we going to strike this panel or will the Court instruct the panel to disregard the question?" When the trial court indicated that it would instruct the panel to disregard the question, Powell's counsel objected that he was "not sure that instructing them is sufficient ... if they've already been told-." The trial court cut off the objection, stating that the members of the panel had already indicated they were unaware of the case and that "all I can do is tell them to disregard the question."

Guilt-Determination Phase

Apart from the new evidence of Powell's October 21, 2001 letter to the Commonwealth's Attorney in which Powell confessed to the attempted rape of Stacey, the evidence presented during the guilt-determination phase of Powell's second trial was not markedly different from that received during the first trial. Because we have thoroughly recounted that evidence in reviewing his first trial, *see Powell,* 261 Va. at 518-520, 552 S.E.2d at 347-348, and Powell does not challenge the sufficiency of the evidence except with respect to proof of the attempted rape of Stacey, we need not reiterate the full extent of the evidence, but will suffice with a summary of the essential details.

Powell, who was twenty years old at the time of the crimes, had been acquainted with Stacey and her family for approximately two-and-a-half years. Powell, a self-avowed racist and white supremacist, objected to Stacey dating Sean Wilkerson, a black classmate of Stacey's. *Id.* at 518, 552 S.E.2d at 347.

Stacey arrived home just before noon on January 29, 1999 to find Powell waiting for her. When Powell learned that Robert Culver, a friend of the girls' mother, would be home shortly for lunch, Powell left, but returned at about 12:45 p.m., after Culver had left. When Powell returned, he was armed with a survival knife, a butterfly knife, a box cutter, and a 9-millimeter pistol. *Id.*

During the initial investigation, Powell claimed that he and Stacey had argued about her relationship with Wilkerson and in an ensuing struggle, Powell drew the survival knife from his belt and Stacey "got stuck." *Id.* Although Powell denied stabbing Stacey deliberately or otherwise injuring her, an autopsy revealed that she had suffered multiple blunt force injuries to her head, neck, and upper body not consistent with her merely having fallen during a struggle, but consistent with a deliberate stomping. The autopsy also showed that the wound to Stacey's chest was consistent with the knife having been twisted and partially withdrawn and reinserted. *Id.* at 520, 552 S.E.2d at 348.

Powell denied having attempted to sexually assault

Stacey, but when questioned again on that point would not give the investigator "a straight answer." Powell later told police that he "probably" raped Kristie because he "didn't get any with Stacey."

Leaving Stacey for dead, Powell smoked a cigarette and drank a glass of iced tea in the living room of the home, waiting for Kristie to return home from school. When she arrived, Powell met her at the door. Shortly thereafter, Kristie discovered her sister's body. Powell then forced her to go to the basement of the home where he brutally raped her and attempted to kill her by strangulation and by cutting her wrists and throat. *Id.* at 519, 552 S.E.2d at 347.

At the conclusion of the Commonwealth's case-in-chief, Powell moved to strike the evidence on the ground that the Commonwealth had not presented sufficient evidence to corroborate Powell's confession in the October 21, 2001 letter that he had attempted to rape Stacey. The Commonwealth pointed to the physical circumstances, such as the disheveled condition of Stacey's bedroom, Stacey's defensive wounds, and the fact that when her body was discovered her pants' zipper was slightly undone, as corroborating Powell's confession. The trial court denied the motion to strike. Thereafter, Powell elected not to offer any evidence.

The jury was instructed, heard closing arguments, and retired to consider its verdict. After two hours of deliberation, the jury found Powell guilty of capital murder. Powell requested a poll of the jury, which

confirmed that the verdict was unanimous.

Penalty Determination Phase

During the penalty determination phase, the Commonwealth presented evidence of Powell's criminal record, including three convictions for contributing to the delinquency of a minor, two larceny convictions, and his convictions for the abduction, rape, and attempted capital murder of Kristie. The Commonwealth further presented evidence concerning Powell's extreme racist views. Additional evidence showed that Powell had tortured cats when he was younger and that he told an investigator that he wanted to purchase a gun to " [k]ill somebody. Kill a lot of somebodies.... Just for something to do." Powell also told the investigator that he admired Charles Manson and Adolf Hitler, saying that "[t]hey were cool." The Commonwealth also presented evidence that Powell wrote an abusive letter to Stacey's mother in which he included a pornographic picture of a woman who resembled Stacey.

Powell presented evidence from his parents and younger brother, a social worker, a psychologist, and a probation officer. This evidence dealt primarily with Powell's upbringing and transfer of custody from his mother to the Department of Youth and Family Services following his juvenile offenses. The psychologist described Powell's home environment as "toxic." The psychologist further testified that, following his incarceration, Powell had received

"[m]edication to help stabilize his mood," and while medicated Powell "has not had any serious disciplinary infractions." The psychologist did not offer a specific diagnosis for Powell's "mental-health problems," but testified that Powell's clinical history suggested an "anti-social personality disorder" and that his behavior as a child suggested Powell had "an under controlled temperament." The psychologist further testified that the medication Powell had received in the past was "used for manic depressive illness which is now called bi-polar disorder and for certain forms of serious depression."

After ninety minutes of deliberation, the jury returned a unanimous verdict sentencing Powell to death. The jury indicated that the sentence was predicated on both the future dangerousness and vileness aggravating factors.

Sentencing

On May 8, 2003, the trial court held a sentencing hearing and received a pre-sentence report and victim impact evidence from Stacey's mother. Powell's counsel argued that imposition of the death sentence was not appropriate, asserting that so long as Powell were confined and properly medicated, he did not present a continuing danger to society and that a life sentence without possibility of parole was adequate punishment. The Commonwealth responded that Powell had shown no remorse following his conviction in the first trial. The trial court then confirmed the jury's sentence of death. We

consolidated the automatic review of Powell's death sentence with his appeal of the capital murder conviction and expedited the appeal on our docket. Code § 17.1-313(F).

II. DISCUSSION

Powell raises twelve assignments of error, the first two of which merely restate the elements of the statutory review of any death sentence mandated by Code § 17.1-313(C). We will review Powell's arguments in the order in which the trial court considered the issues below.

A. Failure to Dismiss the Capital Murder Indictment

In his sixth and seventh assignments of error, Powell contends that the trial court erred in denying his motions to dismiss the capital murder indictment against him. This was the principal issue addressed by the parties during oral argument before this Court. The various positions under which Powell asserts that he was not subject to trial under the capital murder indictment can be generally summarized as follows:

(1) The opinion and mandate of this Court from Powell's first trial limited his retrial for the killing of Stacey Reed to a charge no greater than first degree murder on any indictment.

(2) Even if retrial on a charge of capital murder was not barred under a new indictment, Powell had

been acquitted, either actually or by implication, of the attempted rape of Stacey Reed in his first trial and, thus, the law of the case doctrine barred his being tried for capital murder based upon the attempted rape of Stacey as the gradation offense.

(3) Principles of double jeopardy bar his retrial for a violation of Code § 18.2-31(5) because the indictment in his first trial did not specify the victim of the gradation offense.

Effect of Prior Opinion and Mandate

We recognize the principle of the "mandate rule," stated by the Court of Appeals of Virginia in a different context, that:

> A trial judge is bound by a decision and mandate from [an appellate court], unless [the court] acted outside [its] jurisdiction. A trial court has no discretion to disregard [a] lawful mandate. When a case is remanded to a trial court from an appellate court, the refusal of the trial court to follow the appellate court mandate constitutes reversible error.

Rowe v. Rowe, 33 Va. App. 250, 257-258, 532 S.E.2d 908, 912 (2000); see also *Frank Shop, Inc. v. Crown Central Petroleum Corp.,* 264 Va. 1, 6, 564 S.E.2d 134, 137 (2002) (holding that "a trial court cannot permit what this Court ... [has] said is unlawful" in a mandate reversing the trial court's prior judgment and remanding the case).

Relying on this principle, Powell contends that the trial court was without authority to retry him on a new indictment charging him with the capital murder of Stacey Reed. Powell's reliance, however, is misplaced.

It is self-evident that while the opinion of an appellate court, under the doctrine of stare decisis, applies to all future cases in the trial courts, the mandate, which is the directive of the appellate court certifying a judgment in a particular case to the court from which it was appealed, speaks only to that case. Moreover, the mandate is controlling only "as to matters within its compass." *Sprague v. Ticonic National Bank,* 307 U.S. 161, 168, 59 S. Ct. 777, 83 L. Ed. 1184 (1939). Thus, while the directive of this Court's mandate binds the circuit court, that court is not thereby prohibited from acting on matters not constrained by the language of the mandate, construed in light of the appellate court's opinion. The mandate rule "is merely a 'specific application of the law of the case doctrine,' [and] in the absence of exceptional circumstances, it compels compliance on remand with the dictates of a superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." *United States v. Bell,* 5 F.3d 64, 66 (4th Cir. 1993) (quoting *United States v. Bell,* 988 F.2d 247, 251 (1st Cir. 1993)).

Undoubtedly, had the trial court permitted the Commonwealth to retry Powell for capital murder on the original amended indictment invalidated by our

decision in reviewing his first conviction, this would have been violative of our mandate and reversible error. Similarly, had the Commonwealth dismissed that indictment and sought a new indictment charging Powell with the capital murder of Stacey Reed prior to the rape of Kristie Reed, it would have been error for the trial court to permit that indictment to stand.

However, nothing in our opinion or mandate from Powell's first appeal required the Commonwealth to retry Powell on the original indictment, abridged to cure the defects found by this Court to charge only first-degree murder. To the contrary, the directive of the mandate expressly stated that Powell was to be retried on that indictment based on the record that was before this Court at that time, only "if the Commonwealth be so advised."

Nor did our opinion or mandate expressly preclude the possibility of trying Powell on a new indictment charging capital murder premised on a different gradation offense after dismissal of the former, defective indictment. Powell's October 21, 2001 letter to the Commonwealth's Attorney in which he revealed that he had attempted to rape Stacey before he killed her is an exceptional circumstance that merits a narrow application of the mandate rule.

We recognize that, generally, serial prosecutions are not permitted where the Commonwealth deliberately refrains from bringing criminal charges arising out of the same act or transaction while prosecuting

others in order to gain the advantage of having multiple trials. *See, e.g., Ashe v. Swenson,* 397 U.S. 436, 444, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970). Such was not the case here, however, given the unexpected and possibly unique circumstance of evidence of an uncharged offense that was not previously known or available coming to light after the conclusion of the first trial in the form of the defendant's voluntary confession.

Accordingly, we hold that the trial court correctly ruled that the opinion and mandate of this Court from Powell's prior appeal did not bar the Commonwealth from dismissing the indictment against him and bringing a new indictment charging him with capital murder premised upon a gradation offense not previously charged by the Commonwealth and based upon evidence that was not previously known or available to the Commonwealth at the time of his first trial.

Acquittal under the "Law of the Case"

Powell contends that although he was not charged in a separate indictment with the attempted rape of Stacey in his first trial, the Commonwealth nonetheless presented evidence tending to show that he attempted to rape Stacey to bolster its claim that her murder was related to a sexual assault. To support this claim, Powell relies upon statements made by the Commonwealth's Attorney during his first trial that the evidence would show that Powell "wanted something more from [Stacey] and she

wasn't going to give it to him and for that she lost her life." Powell further notes that during his first trial the Commonwealth had argued against his motion to strike the evidence on capital murder by stating, in part, that "we have evidence ... [that Powell] was having sex or attempting to have sex with [Stacey]."

Powell contends that as neither the amended indictment for capital murder nor the instructions given to the jury specified the victim of the sexual assault gradation crimes, the Commonwealth intended for the jury in his first trial to consider the possibility that Powell attempted to rape Stacey. Powell notes that because the jury in his first trial sent a question to the trial court "seeking clarification whether the rape of Kristie could satisfy the gradation crime requirement for the capital murder of Stacey," *Powell,* 261 Va. at 526, 552 S.E.2d at 352, this indicated that the jury had considered and rejected the theory that he had attempted to rape Stacey. Relying on *Green v. United States,* 355 U.S. 184, 189-90, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957), Powell asserts that because the jury in his first trial rejected that theory of the crime, it impliedly acquitted him of the gradation offense and, thus, he contends that the law of the case prohibits the Commonwealth from retrying that issue under a new indictment.[6] Powell further points to statements

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[6] On brief, Powell also used the term "res judicata" in describing the effect of his alleged "acquittal" of the attempted rape of Stacey. During oral argument of this appeal, he conceded that he was relying only on the "law of the case" doctrine in

in the opinion from his first appeal concerning the insufficiency of the evidence to prove an attempted sexual assault of Stacey as confirming that he was charged with capital murder based on that gradation offense.

The Commonwealth contends that by identifying Kristie as the victim of the rape or attempted rape in responding to Powell's motion for a bill of particulars, it had clearly indicated that Powell was not charged or on trial for the capital murder of Stacey in the commission of the attempted rape of Stacey. Therefore, the Commonwealth asserts that Powell was never placed in jeopardy for the commission of that crime and, thus, cannot have been "acquitted" of that crime or of its gradation offense.

Powell contends that "the bill of particulars is irrelevant to the issue of whether the [Supreme] Court previously decided that Powell was charged with capital murder in the commission of the attempted rape of Stacey Reed in his first trial." Powell bases this contention on the statements in the opinion reversing his first conviction for capital murder that "[t]he record as a whole is devoid of any evidence that Powell attempted to rape ... Stacey," *Powell,* 261 Va. at 534, 552 S.E.2d at 357, and that "there is simply no evidence upon which the jury could have relied to find that Powell committed or attempted to commit any sexual assault against Stacey," *id.* at 545, 552 S.E.2d at 363. Powell

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asserting the preclusive effect of his prior trial and appeal.

contends that by these statements we indicated that the question whether he had raped or attempted to rape Stacey had been at issue in his first trial. We disagree.

The question, simply put, is whether the jury in Powell's first trial considered whether Powell attempted to rape Stacey Reed and concluded that he did not. Our guide in resolving that question is *Ashe, supra,* wherein the United States Supreme Court held that an issue will be precluded from being retried in a subsequent criminal prosecution by the law of the case doctrine if, in light of the entire record, the previous jury necessarily decided that issue against the prosecution. But if "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," the prior judgment will not be taken as deciding that particular issue. *Ashe,* 397 U.S. at 444, 90 S. Ct. 1189. "The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.* (quoting *Sealfon v. United States,* 332 U.S. 575, 579, 68 S. Ct. 237, 92 L. Ed. 180 (1948)).

Powell's view of the record of his first trial, and of this Court's observation that the evidence therein was insufficient for the jury to have found that he attempted to rape Stacey, as showing that the previous jury necessarily decided that issue against the prosecution fails to take into account the effect of the bill of particulars. "It is true the bill of particulars is not for the purpose of charging the

offense. The indictment must do that." *Livingston v. Commonwealth,* 184 Va. 830, 837, 36 S.E.2d 561, 565 (1946). "However, the bill of particulars and the indictment must be read together. The function of the bill of particulars is to supply additional information concerning an accusation." *Id.* A bill of particulars not only informs the accused of the charges against him with sufficient precision to enable him to prepare his defense and avoid surprise, it also enables him to plead his acquittal or conviction in bar of any further prosecution for the same offense. *See Wade v. Commonwealth,* 9 Va. App. 359, 363, 388 S.E.2d 277, 279 (1990); see also *United States v. Davidoff,* 845 F.2d 1151, 1154 (2d Cir. 1988).

The bill of particulars in Powell's first trial clearly limited the prosecution of the capital murder of Stacey under Code § 18.2-31(5) to proof of the rape or attempted rape of Kristie. Nevertheless, Powell asserts that the various statements of the Commonwealth during his first trial with respect to Powell's effort to initiate consensual intercourse with Stacey, and his frustration at being rebuffed by her, suggested a motive for his subsequent attack on her sister and attempted to influence the jury into believing that Stacey was also the victim of an attempted sexual assault. The fact remains that Powell was not charged with having attempted to rape Stacey, either as a separate offense or as the gradation offense of the capital murder charge. Thus, it is not possible to conclude that the jury necessarily decided that issue against the prosecution.

Powell is also mistaken in his interpretation of our statements regarding his first trial that the record contained insufficient evidence for the jury to have found that Powell attempted to rape Stacey. A careful reading of our opinion shows that these statements were not intended to convey that this issue was before the jury. To the contrary, these statements were observations made to clarify that the amended indictment must have been intended to charge Powell with the capital murder of Stacey premised upon the gradation offense of the rape of Kristie, but was insufficient to do so because of a drafting error.[7]

Powell also contends that even if the jury had not impliedly acquitted him of the capital murder of Stacey premised on the gradation offense of her rape or attempted rape, the effect of this Court's decision in the appeal of his first conviction nonetheless was to expressly acquit him of that crime because we found the evidence in that trial insufficient to support a finding of rape or attempted rape of Stacey. Relying on *Burks v. United States,* 437 U.S. 1, 5-6, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978), Powell asserts that, because we held that the evidence at his first trial at best would have supported a conviction

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[7] We also held that the amendment of the indictment, even if properly drafted, would not have been permitted because the grand jury "was never called upon to consider [the rape of Kristie] as the gradation crime for the capital murder of Stacey." *Powell,* 261 Va. at 534, 552 S.E.2d at 357.

for first degree murder, the trial court was bound by that determination in any subsequent retrial. Powell contends that *Burks* stands for the proposition that the determination of an appellate court that the trial court erred in permitting the jury to consider a charge not supported by the evidence acts as an acquittal on that charge and that a retrial for the same offense is barred by the prohibition against double jeopardy.

Our conclusion that, lacking evidence of a sexual assault on Stacey or the attempt to commit one, Powell could be retried only for first degree murder was based upon "the circumstances of this case." *Powell,* 261 Va. at 545-46, 552 S.E.2d at 363. Nothing in that statement implies that Powell had been acquitted of capital murder premised on any possible gradation offense, nor, as we have already demonstrated, did it preclude the Commonwealth from seeking to indict Powell for the capital murder of Stacey with the attempted rape of Stacey as the gradation offense under the exceptional circumstances occasioned by Powell's voluntary confession.

Accordingly, we hold that the trial court did not err in denying Powell's motions to dismiss the indictment for capital murder on the ground that the Commonwealth was prohibited from proving Powell attempted to rape Stacey by the law of the case of his former trial and appeal.

Double Jeopardy

Powell also contends that the trial court should have dismissed the indictment against him because his prosecution under that indictment violated the guarantee of the Fifth Amendment of the Constitution of the United States against being twice placed in jeopardy for the same offense. Specifically, he asserts that having been indicted once for a violation of Code § 18.2-31(5) for the murder of Stacey Reed, his constitutional guarantee of protection against being placed in double jeopardy prohibited the Commonwealth from indicting him a second time for that murder under the same subsection of the capital murder statute.

During oral argument of this appeal, Powell acknowledged that the Commonwealth may indict and convict an accused for multiple counts of capital murder of a single victim under different subsections of Code § 18.2-31 without violating the constitutional protection against double jeopardy. *See Bailey v. Commonwealth,* 259 Va. 723, 747, 529 S.E.2d 570, 584, *cert. denied,* 531 U.S. 995, 121 S. Ct. 488, 148 L. Ed. 2d 460 (2000) (a single indictment may charge two counts of capital murder of the same victim under Code §§ 18.2-31(7) and 18.2-31(12)). Moreover, we have held that where a particular subsection of Code § 18.2-31 lists multiple gradation offenses, the Commonwealth may indict the accused for separate offenses of capital murder of a single victim premised on each specific gradation offense. *Payne v. Commonwealth,* 257 Va. 216, 228, 509 S.E.2d 293,

301 (1999) (indictments properly charged separate violations of Code § 18.2-31(5) premised on rape and object sexual penetration of the same victim). In *Payne,* we said that "it is clear, as well as logical, that the General Assembly intended for each statutory offense [in Code § 18.2-31] to be punished separately 'as a Class 1 felony.'" *Id.*

By statutory definition, capital murder is limited to the "willful, deliberate, and premeditated killing of any person" under specific circumstances or in the commission or attempted commission of certain crimes enumerated in Code § 18.2-31. We have frequently referred to these crimes as gradation offenses because, when committed as part of the same transaction as a murder, they elevate what would otherwise constitute murder of the first degree pursuant to Code § 18.2-32 to capital murder. Pertinent to the present case, Code § 18.2-31(5) specifies gradation offenses of "rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration." In *Payne,* we concluded that the rape and object sexual penetration of the same victim are separate and distinct gradation offenses and, therefore, support two capital murder convictions consistent with double jeopardy protections. *Id.* While *Payne* is instructive insofar as it establishes that separate and distinct gradation offenses are enumerated in Code § 18.2-31(5), it does not resolve Powell's case.

Powell's contention that he was charged with the same crime rather than with two separate crimes

under the amended indictment and the 2001 indictment is principally premised upon the fact that the former failed to identify the victim of the rape or attempted rape. Because the amended indictment in his first trial, while identifying Stacey as the victim of the murder, did not specify a victim of the gradation offenses of rape or attempted rape, Powell contends that proof of the identity of the victim was not an element of those offenses. Thus, he argues that he was placed in jeopardy regardless of whether Stacey or Kristie were proven to be the victim of the gradation offenses of rape or attempted rape, and the subsequent indictment that expressly identified Stacey as the victim of attempted rape violated his constitutional guarantee against double jeopardy.

We agree with Powell that when an indictment does not specify the identity of the victim of a gradation offense to the crime of capital murder, the identity of the victim of the gradation offense is not an element of the crime. Powell, however, has again overlooked the significance of the bill of particulars provided by the Commonwealth in his first trial. As we have already explained, the Commonwealth expressly identified Kristie as the victim of the gradation offenses for the capital murder of Stacey under Code § 18.2-31(5). The bill of particulars was filed well in advance of the trial and before jeopardy had attached. *See Commonwealth v. Washington,* 263 Va. 298, 307, 559 S.E.2d 636, 641 (2002) ("The right not to be subjected to double jeopardy attaches in a criminal case when the jury is impaneled and sworn").

During oral argument of this appeal, Powell contended that the bill of particulars only limits the Commonwealth's ability to argue a specific theory of the crime, does not amend the indictment, and jeopardy attaches as to the indictment as worded regardless of whether a bill of particulars has been filed. We disagree.

As noted above, while "[i]t is true the bill of particulars is not for the purpose of charging the offense ... the bill of particulars and the indictment must be read together." *Livingston,* 184 Va. at 837, 36 S.E.2d at 565. Thus, we hold that where, prior to the attachment of jeopardy, the Commonwealth limits the prosecution of a capital murder, undifferentiated in the indictment by the identity of the victim of the gradation offense, by naming a specific victim of the gradation offense in a bill of particulars, jeopardy will attach only to the capital murder charge as made specific by the bill of particulars.

For these reasons, we further hold that the trial court did not err in refusing to dismiss the indictment for capital murder as violative of Powell's double jeopardy protection.

B. Constitutionality of Virginia's Capital Murder Statutes

In his third and eleventh assignments of error, Powell attacks the trial court's order overruling his

motions to have the Virginia capital murder statutes declared unconstitutional. With respect to the motion filed April 25, 2002 and overruled by the trial court on May 6, 2002, Powell has restated, in summary fashion, five of his arguments advanced in the trial court, without citation to authority.[8] The failure to adequately brief an assignment of error constitutes a waiver of the argument. *See, e.g., Burns v. Commonwealth,* 261 Va. 307, 318, 541 S.E.2d 872, 880, *cert. denied,* 534 U.S. 1043, 122 S. Ct. 621, 151 L. Ed. 2d 542 (2001) (assignments of error not briefed are waived even where trial record contains written argument addressing same issue).

Moreover, the arguments raised by Powell have been previously considered and rejected by this Court. The arguments raised by Powell and recent decisions rejecting those arguments are:

That the statutes fail to provide meaningful guidance with respect to the vileness and future dangerousness aggravating factors and that the jury

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[8] At trial, Powell further contended that the expedited review of death sentence cases required by Code § 17.1-313 violated a defendant's constitutional right to equal protection. Powell contended that by eliminating an intermediate review by the Court of Appeals, a defendant is denied the opportunity to perfect the issues and arguments he wishes to make on appeal. He further contended that expediting death sentence appeals on our docket "disadvantaged death-sentence defendants by providing them with substantially less time than other criminal defendants to protect their legal rights." Powell does not reassert these issues on appeal.

is not provided adequate guidance with respect to the application of aggravating and mitigating factors. Rejected in *Morrisette v. Commonwealth,* 264 Va. 386, 397, 569 S.E.2d 47, 55 (2002), *cert. denied,* 540 U.S. 1077, 124 S. Ct. 928, 157 L. Ed. 2d 750 (2003).

That permitting evidence of unadjudicated criminal conduct to be used to establish the defendant's future dangerousness fails to meet the "heightened reliability requirement" of the 8th and 14th Amendments. Rejected in *Bell v. Commonwealth,* 264 Va. 172, 203, 563 S.E.2d 695, 716 (2002), *cert. denied,* 537 U.S. 1123, 123 S. Ct. 860, 154 L. Ed. 2d 805 (2003).

That the trial court is improperly vested with discretion whether to set aside the death sentence for good cause shown and is permitted to consider hearsay evidence in the pre-sentence report. Rejected in *Lenz v. Commonwealth,* 261 Va. 451, 459, 544 S.E.2d 299, 303-04, *cert. denied,* 534 U.S. 1003, 122 S. Ct. 481, 151 L. Ed. 2d 395 (2001).

That the mandatory proportionality review procedures employed by this Court fail to meet constitutional standards. Rejected in *Lovitt v. Commonwealth,* 260 Va. 497, 509, 537 S.E.2d 866, 874 (2000), *cert. denied,* 534 U.S. 815, 122 S. Ct. 41, 151 L. Ed. 2d 14 (2001); *Bailey,* 259 Va. at 740-42, 529 S.E.2d at 580-81, *cert. denied,* 531 U.S. 995, 121 S. Ct. 488, 148 L. Ed. 2d 460 (2000).

With respect to the December 11, 2002 motion,

overruled by the trial court on December 23, 2002, Powell asserts, as he did in the trial court, that the United States Supreme Court's decision in *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), requires that "many of the procedural safeguards that heretofore have only been required during the guilt/innocence phase of trial must now be extended to the sentencing phase." Powell reasons that because *Ring* held that it was impermissible in a jury trial to allow the trial judge to determine whether there were aggravating factors sufficient to warrant the imposition of the death penalty, *id.* at 609, 122 S. Ct. 2428, the aggravating factors required to be found by Code § 19.2-264.4(B) before a sentence of death may be imposed are "to be treated as elements of the offense of a death-eligible capital murder." Powell contends that the standards of proof and rules of evidence applicable to the determination of guilt must also be applied to the determination of sentence, and that, contrary to decisions of this Court made prior to *Ring,* this precludes the Commonwealth from presenting under a "relaxed evidentiary standard" evidence of unadjudicated criminal conduct or hearsay evidence when the declarant is not available for cross-examination as required by the confrontation clause.

The Commonwealth responds that *Ring* does not alter the analysis of the constitutionality of the procedures applied during the penalty determination phase of a capital murder trial in Virginia. Rather, the Commonwealth contends that the procedures for the admission of relevant evidence during the

penalty determination phase under Code § 19.2-264.4(B) continue to be fully in accord with the Sixth Amendment due process concerns underpinning the decision in *Ring*. We agree with the Commonwealth.

First, we note that Powell's expansive reading of *Ring* is unwarranted for the obvious reason that the statutory scheme at issue in that case, which permitted the judge in a capital murder jury trial to assume the role of the jury in determining whether aggravating factors permitting the imposition of the death penalty were present, is markedly different from that of Virginia's death penalty sentencing statute. *See Ring,* 536 U.S. at 588. Moreover, nothing in the United States Supreme Court's opinion in *Ring* suggests that the Court intended to revisit broader issues of due process protections afforded in the penalty determination phase of all capital murder trials.

We further reject Powell's contention that there is a "relaxed evidentiary standard" applicable to the penalty determination phase of a capital murder trial in Virginia. To the contrary, Code § 19.2-264.4(B) expressly provides, and we have consistently held, that the Commonwealth must prove the existence of one or both aggravating factors beyond a reasonable doubt. *See, e.g., Clark v. Commonwealth,* 220 Va. 201, 212, 257 S.E.2d 784, 791 (1979), *cert. denied,* 444 U.S. 1049, 100 S. Ct. 741, 62 L. Ed. 2d 736 (1980). Powell's contention that the introduction of evidence of unadjudicated criminal acts is not admissible because *Ring*

somehow refines the need for "heightened reliability" in capital sentencing is, as the Commonwealth notes, nothing more than a reassertion of the same argument raised in his prior motion and consistently rejected by this Court. *Jackson v. Commonwealth,* 267 Va. 178, 188, 590 S.E.2d 520, 526 (2004) (today decided). Powell's assertion that Code § 19.2-264.4(B) permits the introduction of hearsay evidence not otherwise subject to an exception is simply wrong.[9] *See, e.g., Lovitt v. Warden,* 266 Va. 216, 259, 585 S.E.2d 801, 826 (2003); *Jackson,* 267 Va. at 188, 590 S.E.2d at 526. For these reasons, we hold that the trial court did not err in overruling Powell's motion to have the Virginia capital murder statutes declared unconstitutional.

C. Failure to Disqualify the Commonwealth's Attorney

In his tenth assignment of error, Powell contends that the trial court erred in failing to grant his motion to disqualify the Commonwealth's Attorney and his office from prosecuting Powell on the new indictment. Powell asserts the "grossly offensive personal attacks" on the Commonwealth's Attorney in Powell's October 21, 2001 letter, created a direct

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[9] On brief, the Commonwealth suggests that Powell has confused the evidentiary standard applicable to the penalty determination phase with that applicable to the trial court's consideration of the presentence report. Powell did not respond to this assertion in his reply brief and does not otherwise assert that *Ring* has any implication to the post-verdict sentencing procedure. Accordingly, we express no opinion on that issue.

conflict of interest because the Commonwealth's Attorney "had a personal stake in the outcome of this case." This is so, Powell contends, because the personal attacks in his letter "undoubtedly led [the Commonwealth's Attorney] to have feelings of animosity towards Powell." The Commonwealth responds that the Commonwealth's Attorney represented to the trial court that he could impartially prosecute the case and that it was a matter within the trial court's discretion to determine whether to disqualify him. We agree with the Commonwealth.

The due process rights of a criminal defendant under both the Virginia and United States Constitutions are violated when a Commonwealth's Attorney who has a conflict of interest relevant to the defendant's case prosecutes the defendant. *See Cantrell v. Commonwealth,* 229 Va. 387, 394, 329 S.E.2d 22, 26-27 (1985); *Ganger v. Peyton,* 379 F.2d 709, 714 (4th Cir. 1967). However, the question whether there is a conflict of interest is dependent upon the circumstances of the individual case, and the burden is on the party seeking disqualification of the prosecutor to present evidence establishing the existence of disqualifying bias or prejudice. The determination whether the evidence supports a finding of a conflict of interest is a matter committed to the sound discretion of the trial court. *See Lux v. Commonwealth,* 24 Va. App. 561, 569, 484 S.E.2d 145, 149 (1997).

The issue may arise where the prosecutor has had an

attorney-client relationship with the parties involved whereby he obtained privileged information that may be adverse to the defendant's interest in regard to the pending criminal charges. *See, e.g., Commonwealth v. Kilgore,* 15 Va. App. 684, 694, 426 S.E.2d 837, 842 (1993). A second situation is where the prosecutor has some direct personal interest arising from a financial interest, kinship, or close friendship such that his objectivity and impartiality are called into question. *See, e.g., Cantrell,* 229 Va. at 391-94, 329 S.E.2d at 24-27. Neither of these circumstances applies to the present case.

Beyond these categories of clear and direct conflicts of interest and ethical bars to a particular attorney prosecuting a particular defendant, there is the broader consideration of whether, on the facts of a particular case, the adversarial nature of the judicial process has resulted in such enmity toward the defendant on the part of the prosecutor that it will overbear his professional judgment in seeking fairly and impartially to see justice done. *See Lux,* 24 Va. App. at 569, 484 S.E.2d at 149. As the United States Supreme Court has observed in a related context, "'[i]mpartiality is not gullibility. Disinterestedness does not mean child-like innocence.'" *Liteky v. United States,* 510 U.S. 540, 551, 114 S. Ct. 1147, 127 L. Ed. 2d 474 (1994) (quoting *In re J.P. Linahan, Inc.,* 138 F.2d 650, 654 (2nd Cir. 1943)). We are of opinion that the same can be said of the prosecutor's role.

The adversarial nature of criminal prosecutions

unsurprisingly tends to engender some level of friction between the prosecutor and the defendant in difficult cases, especially where, as here, the defendant seems intent on showing his contempt and disrespect for the prosecutor. However, merely demonstrating a history of one-sided acrimony between the defendant and the prosecutor is insufficient to establish a conflict of interest or prosecutorial misconduct with respect to an otherwise proper prosecution. *See, e.g., Phelps v. Hamilton,* 59 F.3d 1058, 1067 (10th Cir. 1995). If such were not the case, a defendant would have an incentive to deliberately incite such enmity. The evidence must reflect that the prosecutor is acting not within the dictates of the law, but has strayed outside those parameters in furtherance of a personal animus against the defendant.

Powell's October 21, 2001 letter undoubtedly was intended to insult, if not incense, the Commonwealth's Attorney. But, the trial court was within its discretion to accept the Commonwealth's Attorney's assurance that it had not had an effect on his professional judgment in seeking fairly and impartially to see justice done. Moreover, nothing in the Commonwealth's Attorney's conduct of the trial evinces any lack of such professional judgment on his part. Accordingly, we hold that the trial court did not abuse its discretion in overruling Powell's motion to disqualify the Commonwealth's Attorney.

D. Failure to Exclude Testimony of Kristie Reed

In his ninth assignment of error, Powell contends that the trial court erred in permitting the Commonwealth to call Kristie as a witness and to give testimony concerning Powell's rape and attempted murder of her during the guilt determination phase of his trial.[10] He asserts that evidence of the events following the murder of Stacey was not relevant to prove his culpability for that crime and that such evidence was, in any case, unduly prejudicial.[11]

The Commonwealth responds that evidence of the rape and attempted murder of Kristie, including her testimony and its supporting exhibits, was admissible because those acts were interrelated parts of a common criminal plan and, thus, were relevant to prove Powell's identity, motive, and intent as the perpetrator of all the crimes committed in the course of carrying out that plan. In addition, the Commonwealth contends that evidence of the

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[10] In his pre-trial motion, Powell sought to exclude all evidence of his rape and attempted murder of Kristie. On appeal, he has limited his argument to the exclusion of her testimony and the exhibits introduced in its course.

[11] Powell also asserts that Kristie's testimony was unnecessary because it was cumulative of other evidence and should more properly have been received as "victim impact testimony" during sentencing. These arguments were not made at trial and, thus, are barred from consideration in this appeal. Rule 5:25.

subsequent attack on Kristie was probative of Powell's state of mind during the entire criminal enterprise and, thus, admissible to show premeditation in the killing of Stacey to rebut Powell's claim that the killing was accidental. We agree with the Commonwealth.

Generally, evidence of other offenses is inadmissible in a criminal prosecution, but it is a well-established exception that such evidence is admissible to show a common criminal scheme when the various acts are naturally explained as the constituent parts of the defendant's general plan. *See Satcher v. Commonwealth,* 244 Va. 220, 230, 421 S.E.2d 821, 828 (1992), *cert. denied*, 507 U.S. 933, 113 S. Ct. 1319, 122 L. Ed. 2d 705 (1993); *Kirkpatrick v. Commonwealth,* 211 Va. 269, 272, 176 S.E.2d 802, 805 (1970); *McWhorter v. Commonwealth,* 191 Va. 857, 870-71, 63 S.E.2d 20, 26 (1951). In *Kirkpatrick* we explained that:

> [e]vidence of other offenses is admitted if it shows the conduct and feeling of the accused toward his victim ... or if it tends to prove any relevant element of the offense charged. Such evidence is permissible in cases where the motive, intent or knowledge of the accused is involved, or where the evidence is connected with ... the offense for which the accused is on trial.

211 Va. at 272, 176 S.E.2d at 805; *see also Satcher,* 244 Va. at 230, 421 S.E.2d at 828.

There can be no question that it was the Commonwealth's theory in this trial, and taking the evidence in the light favorable to the Commonwealth it is an unassailable fact, that Powell went to the Reed home with the intention of raping and killing both Stacey and Kristie. As such, the evidence of Powell's rape and attempted murder of Kristie was directly probative of his motive and intent in the attempted rape and murder of Stacey. Moreover, Kristie's eyewitness testimony placing Powell in the home when she arrived and identifying him as her assailant was critical to establishing Powell's identity as the perpetrator of the crimes that preceded the criminal acts committed against her.

Powell's contention that the graphic and emotional testimony of the victim of a brutal rape and attempted murder should have been excluded because its probative value was outweighed by the prejudice it would cause in the minds of the jury is equally without merit. All evidence tending to prove guilt is prejudicial to an accused, but the mere fact that such evidence is powerful because it accurately depicts the gravity and atrociousness of the crime or the callous nature of the defendant does not thereby render it inadmissible. Moreover, direct evidence, such as eyewitness testimony, is rarely subject to exclusion on the ground that it would be unduly prejudicial. In any case, determination of the issue is committed to the sound discretion of the trial court. *Spencer v. Commonwealth,* 240 Va. 78, 90, 393 S.E.2d 609, 617, *cert. denied,* 498 U.S. 908, 111 S. Ct. 281, 112 L. Ed. 2d 235, (1990). Accordingly, we hold

that the trial court did not err in failing to grant Powell's pre-trial motion to exclude the testimony of Kristie Reed from the guilt determination phase of the trial.

E. Failure to Suppress Powell's Statements to Police

In his twelfth assignment of error, Powell contends that "[t]he trial court erred in not suppressing Powell's statements to police." Although he uses the plural term "statements" in the assignment of error and makes references to the ability of an accused to revoke a prior waiver of his right to remain silent, Powell does not expressly restate the contention made in the trial court that statements made during the initial investigation prior to his first trial should have been suppressed because at the conclusion of his first interview he stated that he had nothing more to say. Because Powell has not expressly raised this issue on brief or during oral argument, it has been waived and we will not address it. *Burns,* 261 Va. at 318, 541 S.E.2d at 880.

Powell does assert that the trial court erred in not suppressing the statement concerning Powell's October 21, 2001 letter that he made on November 2, 2001 while in prison to an investigator. Powell contends that because he was still represented by counsel from his first trial, the investigator should not have questioned him without his counsel being present.

The Commonwealth responds that the Sixth

Amendment right to counsel had not attached with respect to the crime for which the investigator was gathering evidence and for which Powell would be indicted as a result of the evidence in his October 21, 2001 letter. Moreover, as Powell executed a waiver of his Fifth Amendment rights immediately prior to giving the November 2, 2001 statement, the Commonwealth contends that the statement was properly admitted. We agree with the Commonwealth.

The Sixth Amendment right to counsel "arises from the fact that the suspect has been formally charged with a particular crime and thus is facing a state apparatus that has been geared up to prosecute him." *Arizona v. Roberson,* 486 U.S. 675, 685, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988); *see also Alston v. Commonwealth,* 264 Va. 433, 437, 570 S.E.2d 801, 803 (2002). We have already determined that the crime for which Powell was tried and convicted in the present case was a separate offense from those for which he had been previously convicted. Powell had not been formally charged with that offense when he was interviewed on November 2, 2001 and, thus, he was not entitled to have his counsel from his prior trial present during that interview. *Eaton v. Commonwealth,* 240 Va. 236, 252, 397 S.E.2d 385, 394 (1990), *cert. denied,* 502 U.S. 824, 112 S. Ct. 88, 116 L. Ed. 2d 60 (1991). As Powell does not dispute that he freely and knowingly waived his Fifth Amendment right to counsel at the time of the interview, we hold that the trial court did not err in failing to suppress Powell's statement.

F. Limiting Voir Dire and Failure to Strike Jury Panel

In his fourth assignment of error, Powell contends that the trial court erred in not permitting him to question prospective jurors about whether knowledge of Powell's prior conviction for capital murder and its subsequent reversal on appeal would influence their opinion as to his guilt. Powell concedes that a prospective juror with knowledge of a defendant's prior conviction is subject to disqualification on that ground. *Barker,* 230 Va. at 375, 337 S.E.2d at 733. *But see Patton v. Yount,* 467 U.S. 1025, 1035, 104 S. Ct. 2885, 81 L. Ed. 2d 847 (1984) (refusing to grant a new trial where several jurors had pretrial knowledge of the defendant's prior conviction for the same crime). Powell contends, however, that in his case the jury would ultimately learn of his prior conviction during the trial and, thus, asserts that he should have been able to question jurors on the effect this evidence would have on them.

The purpose of voir dire is "to ascertain whether [a prospective juror] is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein." Code § 8.01-358. To that end, prospective jurors may be asked any question relevant to determine whether they may be subject to being removed from the venire for cause.

The test of relevancy is whether the questions relate to any of the four criteria set forth in the statute. If

> an answer to the question would necessarily disclose, or clearly lead to the disclosure of the statutory factors of relationship, interest, opinion, or prejudice, it must be permitted.

LeVasseur v. Commonwealth, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983), *cert. denied*, 464 U.S. 1063, 104 S. Ct. 744, 79 L. Ed. 2d 202 (1984)

The question that Powell attempted to ask the first panel of the venire was not one that "would necessarily disclose, or clearly lead to the disclosure of the statutory factors of relationship, interest, opinion, or prejudice" of the prospective jurors. The panel had already indicted that they had no prior knowledge of the case and had not formed an opinion as to Powell's guilt or innocence. Powell's question would not have revealed any preexisting opinion or bias with respect to his case, but would instead have served to test the jurors' potential response to the evidence that he expected the Commonwealth to present.

Whether to permit a party to ask a question that goes beyond what is permissible under Code § 8.01-358 is a matter entirely within the trial court's discretion. *Id.* We hold that the trial court did not err in refusing to permit Powell to test the potential response of the jurors to the evidence that would be adduced at trial concerning his prior conviction.

In his eighth assignment of error, Powell contends that, having denied him the opportunity to question

the potential jurors on this point, the trial court should have disqualified for cause the five members of the first panel because his attempt to question them provided them with knowledge that he had been previously convicted for the capital murder of Stacey Reed. Thus, he contends that these jurors were subject to automatic exclusion under *Barker*.

Even if we were to agree that Powell's curtailed question provided the five prospective jurors with sufficient information to raise the concern for potential prejudice that the jurors' full knowledge of the defendant's prior conviction raised in *Barker*, that circumstance arose here through Powell's own conduct during the voir dire. The record demonstrates that Powell's counsel was fully aware that advising the prospective jurors that Powell had been previously convicted of capital murder carried with it the potential for creating bias against his client, but apparently deemed this risk acceptable in order to seek the strategic advantage of being able to test the jurors' potential response to the evidence concerning that conviction during the trial. Counsel further recognized the risk that the trial court would not permit him to pursue that line of questioning, and, as we have just determined, was within its discretion to do so.

Under the "invited error" doctrine Powell may not benefit from his counsel's voluntary, strategic choice to place Powell at a potential disadvantage in the hope, unproductive though it was, of gaining some advantage. *See, e.g., Moore v. Hinkle*, 259 Va. 479,

491, 527 S.E.2d 419, 426 (2000); *Saunders v. Commonwealth,* 211 Va. 399, 400, 177 S.E.2d 637, 638 (1970); *Clark v. Commonwealth,* 202 Va. 787, 791, 120 S.E.2d 270, 273 (1961). "No litigant, even a defendant in a criminal case, will be permitted to approbate and reprobate to invite error ... and then to take advantage of the situation created by his own wrong." *Fisher v. Commonwealth,* 236 Va. 403, 417, 374 S.E.2d 46, 54 (1988), *cert. denied,* 490 U.S. 1028, 109 S. Ct. 1766, 104 L. Ed. 2d 201 (1989). Accordingly, we hold that the trial court did not err in refusing to strike the members of the first voir dire panel for cause under the particular circumstances created by Powell in this case.

G. Failure to Strike the Evidence

In his fifth assignment of error, Powell contends that the trial court erred in failing to strike the evidence as to capital murder on the ground that the Commonwealth had not adequately corroborated his confession in the October 21, 2001 letter of having attempted to rape Stacey. Thus, Powell contends that the evidence at best would have supported a conviction for first degree murder. We disagree.

Although the Commonwealth may not establish an essential element of a crime by the uncorroborated confession of the accused alone, "'only slight corroborative evidence'" is necessary to show the veracity of the confession. *Williams v. Commonwealth,* 234 Va. 168, 175, 360 S.E.2d 361, 366 (1987) (quoting *Clozza v. Commonwealth,* 228

Va. 124, 133, 321 S.E.2d 273, 279 (1984), *cert. denied*, 469 U.S. 1230, 105 S. Ct. 1233, 84 L. Ed. 2d 370 (1985)), *cert. denied*, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988). What is more, if "[t]his corroborating evidence is consistent with a reasonable inference" that the accused committed the crime to which he has confessed, the Commonwealth need not establish through direct evidence those elements of the crime that are proven by the confession. *See Jackson v. Commonwealth*, 255 Va. 625, 646, 499 S.E.2d 538, 551 (1998), *cert. denied*, 525 U.S. 1067, 119 S. Ct. 796, 142 L. Ed. 2d 658 (1999).

Contrary to Powell's contention that there is not even "slight" corroborative evidence to support the reliability of his confession, the forensic evidence and direct testimony are consistent with and substantiate Powell's version of "the rest of what happened" in every relevant respect. Powell's going to the home armed when he knew Stacey would be there alone, Stacey's defensive wounds, the evidence that her pants' zipper was slightly undone, the subsequent rape of Kristie, and Powell's later concession that he raped Kristie because he "didn't get any with Stacey" all corroborate his confession to the attempted rape of Stacey in the October 21, 2001 letter. Accordingly, we hold that the trial court did not err in overruling Powell's motion to strike the evidence as to capital murder premised on the attempted rape of Stacey.

H. Mandatory Sentence Review

In his first and second assignments of error, Powell contends that the jury imposed the sentence of death under the influence of passion, prejudice, or some other arbitrary factor and that the sentence of death is disproportionate to the penalty imposed in other cases considering both the crime and the defendant. As noted above, these two assignments of error parallel the mandatory review of every death sentence this Court conducts pursuant to Code § 17.1-313(C). Accordingly, we will combine the mandatory review of Powell's death sentence with our discussion of the issues raised by Powell in his assignments of error.

Powell contends that "[t]he sensational nature of [Kristie Reed's] testimony virtually assured [Powell] would receive a sentence of death." This is so, he asserts, because "the graphic and irrelevant evidence about the attack on Kristie" would have enraged the jury and rendered it unable to reach an impartial verdict.

We have already determined that evidence of the rape and attempted murder of Kristie was relevant and admissible during the guilt determination phase of the trial. Similarly, Powell's rape and attempted murder of Kristie was relevant for the jury's consideration of his future dangerousness during the penalty determination phase of the trial. Accordingly, Powell's assertion that the jury was influenced by "irrelevant" evidence is without merit.

However, while graphic evidence of a violent crime is admissible in the guilt determination phase of a capital murder trial, we will also consider the potential impact such evidence may have had on the jury's decision to impose the death sentence during the penalty determination phase.

The brutal rape and attempted murder of a thirteen-year-old child are undoubtedly among the most abhorrent crimes that can be placed in evidence before a jury contemplating whether to impose a sentence of death upon a defendant. Nonetheless, the mere fact that the jury is presented with such evidence does not raise a presumption that the jury will be unable to set aside its natural emotions and fairly consider all the evidence. *See Bailey,* 259 Va. at 751, 529 S.E.2d at 586 (evidence of infanticide and uxoricide, though abhorrent crimes, did not preclude jury from making a rational sentencing determination in a capital murder trial).

Powell further contends that the trial court erred in submitting to the jury a verdict form that permitted it to impose a sentence of life imprisonment and a fine but which did not expressly parallel the trial court's sentencing instructions by stating that this form was to be used if the jury found that neither aggravating factor had been proven beyond a reasonable doubt. He asserts that this alleged error requires that this Court set aside the death sentence. Powell concedes that he did not raise this issue at trial, but nonetheless contends that it is proper for this Court to consider his argument as part of the

mandatory review of his sentence, apparently contending that an erroneous verdict form would constitute an "arbitrary factor" that would influence the jury's sentencing decision.

Our review of the record in this case does not disclose that the jury failed to give fair consideration to all the evidence both in favor and in mitigation of the death sentence. Moreover, the jury was properly instructed upon the sentences available and the basis for imposing them and the record supports the jury's determination to impose a sentence of death upon a finding that both aggravating factors were proven beyond a reasonable doubt. We find nothing to suggest that the jury, or the trial court in reviewing the verdict, imposed the death sentence under the influence of passion, prejudice, or other arbitrary factors. Accordingly, we hold that the sentence of death was not imposed under passion, prejudice, or any arbitrary factor.

In a separate section of his brief, ostensibly related to the assignment of error paralleling the passion, prejudice and arbitrary factor aspect of our mandatory review, Powell asserts that the alleged error in the wording of the life sentence verdict form should result in the reversal of his death sentence and a remand for a new sentencing proceeding. While we consider the entire record of a capital murder trial to determine whether the sentence of death should be set aside because of improper influence on the jury, we have previously rejected the contention that the "arbitrary factor" language of

Code § 17.1-313(C)(1) permits a defendant to raise as a separate issue on appeal an issue barred by the failure to make a proper objection in the trial court by contending that the error influenced the jury's sentencing decision. *See Quintana v. Commonwealth,* 224 Va. 127, 148 n.6, 152 n.7, 295 S.E.2d 643, 653 n.6, 656 n.7 (1982) (rejecting assertion in dissenting opinion that mandatory review permitted challenge to form of jury verdict to be raised for the first time on appeal). Accordingly, while Powell is not precluded from arguing that the alleged error in the life sentence verdict form improperly influenced the jury's sentencing decision as a basis for commuting the death sentence, we will not consider his separate argument under the same assignment of error as a basis for reversing that sentence and ordering a new sentencing proceeding.[12]

Powell contends that the death sentenced imposed upon him is excessive or disproportionate when compared to similar cases considering both the crime

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[12] Powell also contends that the "ends of justice" exception of Rule 5:25 would permit us to consider the alleged error in the life sentence verdict form as a basis for reversing his death sentence and ordering a new sentencing proceeding. However, as Powell cannot argue for reversal of his death sentence under the assignment of error paralleling the mandatory review of that sentence and failed to make this issue the subject of a separate assignment of error, the issue is not properly before us. Rule 5:17. Accordingly, we will not address this issue as a basis for reversing the sentence of death and remanding for a new sentencing proceeding.

and the defendant. Powell's sole contention is that his history of mental health problems and his failure to receive adequate treatment when in state custody as a juvenile militates against the appropriateness of the death penalty in his case. We disagree.

Code § 19.2-264.4(B) lists as a mitigating factor the fact that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired." The psychologist called by Powell did not offer a specific diagnosis of Powell's mental health problems, merely classifying them generally as suggesting an anti-social personality disorder and "a mood disorder, primarily depressive in nature ... characterized by irritability, short temper and so forth." The psychologist did not testify that Powell lacked the ability to appreciate the criminality of his conduct or that his condition significantly impaired his ability to conform his conduct to the requirements of the law.

The jury heard this testimony concerning Powell's mental health problems, and we must assume that the jury followed the trial court's instruction to consider evidence presented in mitigation. The jury clearly concluded that Powell's history of mental health problems did not mitigate his offense. See *Swann v. Commonwealth,* 247 Va. 222, 238-39, 441 S.E.2d 195, 206-07, *cert. denied,* 513 U.S. 889, 115 S. Ct. 234, 130 L. Ed. 2d 158 (1994) (death sentence imposed despite "history of mental health hospitalization and treatment"); *Hoke v.*

Commonwealth, 237 Va. 303, 313, 377 S.E.2d 595, 601, *cert. denied,* 491 U.S. 910, 109 S. Ct. 3201, 105 L. Ed. 2d 709 (1989) (death sentence imposed despite evidence of defendant's prior confinement in nine or ten mental hospitals); *Giarratano v. Commonwealth,* 220 Va. 1064, 1076-79, 266 S.E.2d 94, 101-103 (1980) (death sentence imposed despite mitigating evidence of defendant's "schizoid personality disturbance" and "extreme mental and emotional disturbance").

Apart from Powell's contention that his history of mental health problems should preclude the imposition of a death sentence in his case, we are required by Code § 17.1-313(C)(2) to conduct a comparative review of the death sentence imposed in this case with other capital murder cases, including those where a life sentence was imposed. "The purpose of our comparative review is to reach a reasoned judgment regarding what cases justify the imposition of the death penalty." *Orbe v. Commonwealth,* 258 Va. 390, 405, 519 S.E.2d 808, 817 (1999), *cert. denied,* 529 U.S. 1113, 120 S. Ct. 1970, 146 L. Ed. 2d 800 (2000). In conducting this statutorily mandated review in this case, we have focused on cases in which the victim was murdered during the commission of rape or attempted rape, and in which the sentence of death was imposed based on findings of both future dangerousness and vileness. *See, e.g., Patterson v. Commonwealth,* 262 Va. 301, 551 S.E.2d 332 (2001); *Swisher v. Commonwealth,* 256 Va. 471, 506 S.E.2d 763 (1998), *cert. denied,* 528 U.S. 812, 120 S. Ct. 46, 145 L. Ed. 2d 41 (1999); *Pruett v. Commonwealth,* 232 Va. 266,

351 S.E.2d 1 (1986), *cert. denied*, 482 U.S. 931, 107 S. Ct. 3220, 96 L. Ed. 2d 706 (1987); *Coleman v. Commonwealth*, 226 Va. 31, 307 S.E.2d 864 (1983), *cert. denied*, 465 U.S. 1109, 104 S. Ct. 1617, 80 L.Ed.2d 145 (1984); *Mason v. Commonwealth*, 219 Va. 1091, 254 S.E.2d 116, *cert. denied*, 444 U.S. 919, 100 S. Ct. 239, 62 L. Ed. 2d 176 (1979); *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967, 99 S. Ct. 2419, 60 L. Ed. 2d 1074 (1979). We have also considered cases in which defendants received life sentences, rather than the death penalty, for capital murder during the commission of rape or attempted rape. See, *e.g.*, *Horne v. Commonwealth*, 230 Va. 512, 339 S.E.2d 186 (1986); *Keil v. Commonwealth*, 222 Va. 99, 278 S.E.2d 826 (1981). Considering all the factors revealed by the record, both those favoring imposition of the death sentence and those in mitigation against it, we hold that the sentence is neither excessive nor disproportionate to the penalties imposed by other sentencing bodies in the Commonwealth for comparable crimes.

III. CONCLUSION

Having found no error below and perceiving no other reason to commute or set aside the sentence of death, we will affirm the judgment of the trial court.

Affirmed.

Appendix E

Supreme Court of Virginia.
Paul Warner POWELL
v.
COMMONWEALTH of Virginia.
Record Nos. 002242, 002243.

June 8, 2001.*

Present CARRICO, C.J., LACY, HASSELL, KEENAN, KOONTZ, and LEMONS, JJ., and WHITING, Senior Justice.

Opinion by Senior Justice LAWRENCE L. KOONTZ, JR.

In these appeals, we review the capital murder conviction, related convictions, and sentence of death imposed upon Paul Warner Powell.[1]

I. THE CRIMES

We will review the evidence in the light most favorable to the Commonwealth, the party prevailing

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* The April 20, 2001 opinion was withdrawn when a petition for rehearing was granted June 8, 2001.

[1] Powell initially indicated a desire to waive his right to appeal his convictions and death sentence. By order dated October 26, 2000, this Court remanded the case to the trial court for a determination of whether Powell's waiver of his right to appeal was voluntarily and intelligently made. During the trial court's hearing on that matter, Powell withdrew his waiver.

below. *Clagett v. Commonwealth,* 252 Va. 79, 84, 472 S.E.2d 263, 265 (1996), *cert. denied,* 519 U.S. 1122, 117 S. Ct. 972, 136 L. Ed. 2d 856 (1997).

Powell was acquainted with Stacey Lynn Reed (Stacey) for two and a half years prior to the commission of the crimes in question. Kristie Erin Reed (Kristie), Stacey's younger sister, described her sister and Powell as "[f]riends." Powell, who was 20 years old at the time of the murder, had wanted to date Stacey, who was 16 years old, but recognized that she was underage and he "could go to jail for that."

Powell, a self-avowed "racist and white supremacist," was aware that Stacey, who was white, was dating Sean Wilkerson, who is black. Wilkerson had recently moved to another locality, but he and Stacey remained in contact. Stacey was a member of her high school's Junior Reserve Officer's Training Corps and planned to attend a military ball with Wilkerson.

Just before noon on January 29, 1999, Stacey arrived home from school early, having completed her examinations that were being given that day. Powell was waiting for her at her home when she arrived. When Powell learned that Robert Culver, a friend of the girls' mother, would be home shortly for lunch, Powell left and returned at about 12:45 p.m., after Culver had left. When Powell returned, he was armed with a "survival" knife, a "butterfly" knife, a box cutter, and a 9-millimeter pistol.

Stacey was talking to Wilkerson on the telephone. After Stacey ended the telephone conversation, Powell confronted her about her relationship with Wilkerson. He demanded that Stacey end her relationship with Wilkerson. According to Powell, he and Stacey argued, and the argument grew into a struggle. Powell drew the survival knife from his belt and Stacey "got stuck." Powell denied stabbing Stacey deliberately. The struggle continued briefly until Stacey collapsed on the floor in her sister's bedroom.

Although Powell did not know whether Stacey was still alive, he made no effort to determine her condition or call for medical assistance. Powell "wandered around the house, got some iced tea, had a cigarette." Kristie arrived home from school shortly after 3 p.m. and was met at the door of the home by Powell. Powell told her that Stacey was in her room, but moments later Kristie discovered her sister's body in Kristie's bedroom. She dropped her schoolbooks and began to cry.

Powell ordered Kristie to go to the basement. Kristie, who knew that Powell was usually armed, complied because she "didn't want to die." In the basement, Powell ordered Kristie to remove her clothes and to lie on the floor. Powell then raped Kristie, and she "begg[ed] him not to kill her." Powell later admitted that he knew that Kristie, who was 14 years old at the time of the rape, had been a virgin.

While Powell and Kristie were in the basement, Mark Lewis, a friend of Kristie, came to the house and knocked on the door. When Powell heard the knock, he tied Kristie's legs together and tied her hands behind her back with shoelaces he cut from her athletic shoes. Powell then dressed and went upstairs.

While Powell was upstairs, Kristie managed to loosen the bonds on her hands and attempted to "scoot across the floor to hide" under the basement steps. Hearing Powell coming back to the basement, she returned to the position on the floor where he had left her. Powell then strangled Kristie with a shoelace and she lost consciousness. While she was unconscious, Powell stabbed Kristie in the abdomen and slit her wrists and throat.

Powell returned upstairs, searching for "anything worth taking." He fixed another glass of iced tea, which he took with him when he left the home a short time later. Powell went to a friend's house and then drove with the friend to the District of Columbia to buy crack cocaine.

Kristie regained consciousness sometime after Powell had left her home. About 4:10 p.m., she heard Culver return home, and she called out his name. Culver discovered Kristie in the basement, called the 911 emergency response telephone number, and began rendering first aid to her. He later discovered Stacey's body upstairs. Shortly thereafter, paramedics arrived. In response to a question from

one of them, Kristie identified Powell as her attacker. Powell was arrested later that day at the home of his friend's girlfriend, where he and the friend had gone after buying drugs.

Kristie was transported by helicopter to Inova Fairfax Hospital where she received treatment for her injuries. It was ultimately determined that the wounds to her throat and abdomen each came within one centimeter of severing a major artery which likely would have caused her death.

An autopsy revealed that Stacey had died from a knife wound to the heart. The medical examiner testified that there was a single entrance wound and two exit wounds indicating that the knife had been withdrawn, at least partially, and then reinserted into the heart. One wound path pierced the left ventricle and the other went through both the left and right ventricles, exiting the heart at the back of the right ventricle.

Stacey's body also exhibited a number of bruises on the head, chest, abdomen, back, arms, and legs, abrasions on the face, a stab wound to the back, and a cut and scrapes on the left forearm. The autopsy further revealed that Stacey had been struck on the head with sufficient force to cause bleeding inside her scalp and in the membranes surrounding her brain prior to death. These injuries were not consistent with Stacey merely having fallen during a struggle.

The DNA profile obtained from the blood found on Powell's survival knife was consistent with the DNA profile of Stacey's blood. The DNA profile obtained from sperm fractions from swabs taken from Kristie's vagina and perianal area was the same profile as that obtained from Powell's drawn blood sample.

While in jail, Powell wrote letters to friends in which he admitted having committed the murder, rape, and attempted murder because of Stacey's relationship with a black man. He further claimed that he had planned to kill Stacey's family and steal the family's truck. Powell also wrote to a female friend and asked her to "get one of [her] guy friends ... to go to a pay phone and call Kristie and tell her [that] she better tell the cops she lied to them and tell her [that] she better not testify against me or she's gonna die."

Powell told another inmate that he had become angry with Stacey when she refused to have sex with him after talking to Wilkerson. Powell told the inmate that he stabbed Stacey twice and that when he attempted to cut Kristie's throat, his knife was too dull, "[s]o he started stepping on her throat trying to stomp her throat." To another inmate, Powell described Stacey's killing as a "human sacrifice" and expressed satisfaction in having raped a virgin.

II. PROCEEDINGS

A. Pre-Trial

On May 3, 1999, Powell was indicted for the capital

murder of Stacey in the commission of a robbery and/or attempted robbery, Code § 18.2-31(4), attempted capital murder of Kristie in the commission of rape, Code § 18.2-31(5), abduction of Kristie with intent to defile, Code § 18.2-48(ii), and the rape of Kristie, Code § 18.2-61.[2] Powell filed a motion to have the capital murder and death penalty statutes declared unconstitutional and to strike the capital murder and attempted capital murder indictments. In a supporting memorandum, Powell raised several challenges to the constitutionality of the statutes, which he reasserts in these appeals and which will be discussed later in this opinion. The trial court denied the motion.

On September 14, 1999, the Commonwealth filed a motion pursuant to Code § 19.2-231 to amend the indictment for the capital murder of Stacey to also charge capital murder "during the commission of or subsequent to rape and/or attempted rape and/or sodomy and/or attempted sodomy." Powell objected to the proposed amendment, asserting that it would change the nature or character of the offense charged. The trial court permitted the amendment to the indictment.

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[2] Powell was also indicted for grand larceny in violation of Code § 18.2-95 in connection with the theft of a weapon in an unrelated incident, was convicted of that crime, and sentenced to two years imprisonment. Powell does not directly challenge that conviction in these appeals. Powell was also indicted for robbery and attempted robbery in violation of Code § 18.2-58 and three counts of use of a firearm in violation of Code § 18.2-53.1. He was acquitted of these crimes.

On May 5, 1999, Powell made a motion for the appointment of a mental health expert to assist in his defense pursuant to Code § 19.2-264.3:1. The trial court granted this motion on May 14, 1999. Powell subsequently advised the Commonwealth that he intended to use the expert to provide psychiatric evidence in mitigation during the sentencing phase of the trial, if necessary.

On January 5, 2000, the Commonwealth made a motion to have Powell examined by its mental health expert pursuant to Code § 19.2-264.3:1(F)(1). By order entered on February 24, 2000, the trial court appointed Dr. Stanton E. Samenow, a clinical psychologist, to evaluate Powell on behalf of the Commonwealth. The order noted Powell's intention to present psychiatric evidence in mitigation and directed Dr. Samenow to evaluate Powell's sanity at the time of the offense pursuant to Code §§ 19.2-168.1 and 19.2-169.5.

On March 8, 2000, Dr. Samenow met with Powell. After answering the doctor's initial general questions, Powell indicated that he did not "feel like talking no more." Powell then stated that he had decided not to cooperate with the examination and that he had only come to the interview because he "didn't know who was here."

The Commonwealth filed a motion to exclude Powell's psychiatric evidence in mitigation. On March 24, 2000, the trial court entered an order

directing Powell to cooperate with Dr. Samenow, noting specifically that failure to do so would result in the exclusion of Powell's expert evidence. Powell continued to refuse to cooperate with Dr. Samenow. The trial court deferred ruling on the Commonwealth's motion to exclude Powell's expert evidence, entering an order directing Powell's counsel to refrain from mentioning such evidence at trial until its admissibility was determined.

B. Voir Dire

Trial commenced with jury selection on May 1, 2000. The voir dire of potential jurors was conducted in four panels. The trial court questioned jurors generally concerning possible relationships with the victims, Powell, the trial attorneys, and any interest, knowledge of, or opinions about the case. The trial court also questioned the jurors about their ability to be fair and impartial and to render a verdict and sentence based solely on the evidence presented at trial and the trial court's instructions. The jurors of each panel indicated that they would be able to consider the evidence, including evidence in mitigation of a death sentence, fairly and impartially, and to follow the trial court's instructions.

Powell's counsel questioned the first two panels of potential jurors concerning their opinion as to specific types of evidence in mitigation, including Powell's age, his remorse, his "emotional problems from a relatively young age," and his lack of a

"significant history of prior criminal activity." Three jurors in the second panel, Tilley, Neal, and Henderson, each stated that they did not believe Powell's age or a showing of remorse would be factors weighing in favor of a sentence of life rather than death.[3] As Powell's counsel continued this line of questioning by addressing Powell's "learning disabilities and ... problems in school," the Commonwealth objected, asserting that these matters were not permissible evidence in mitigation.

Addressing the Commonwealth's objection, the trial court expressed concern about the entire line of questioning regarding the jurors' views on specific mitigating evidence. Noting that all the jurors had indicated an ability to consider such evidence, the trial court observed that the questions of Powell's counsel were "vague" and "ambiguous" and that the jurors were " confused" by them. The trial court then ruled that these questions "exceeded the scope that the statute allows with voir dire," and that Powell would thereafter be limited to asking jurors whether they would be able to consider mitigating evidence and follow the trial court's instructions on considering such evidence in sentencing. When Powell's counsel subsequently attempted to ask the jurors on the remaining panels whether they had opinions about the value of specific mitigating evidence, the trial court sustained the

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[3] Two of the jurors, apparently misunderstanding counsel's question, first indicated that Powell's age was not a factor they would consider relevant to his guilt or innocence.

Commonwealth's renewed objections.

Powell moved to strike jurors Tilley, Neal, and Henderson for cause, asserting that they had indicated an unwillingness to consider proper mitigating evidence. The trial court overruled the motion, stating that all these jurors indicated they had the ability to consider all the evidence and follow the trial court's instructions. Powell subsequently objected to the seating of the selected jury panel, again asserting that he should have been permitted to inquire into the jurors' opinions about the value of specific mitigating evidence. The trial court overruled the objection.

In the course of questioning by both the Commonwealth and Powell's counsel, prospective juror O'Dell repeatedly expressed her concern that she would be required to make a decision on the imposition of the death penalty and "would find it very difficult" to do so. She further agreed that she had not decided firmly what her opinion of the death penalty was and would have to reach that decision "sometime between now and the end of this case."

The Commonwealth moved to strike O'Dell on the ground that she was uncertain of her views regarding the death penalty and whether she would be able to follow the trial court's instructions regarding sentencing. Powell countered that O'Dell had not affirmatively stated that she would not be able to impose a sentence of death. The trial court sustained the Commonwealth's motion and removed

O'Dell from the venire for cause.

C. Guilt-Determination Phase

During the guilt-determination phase of the bifurcated trial, evidence in accord with the facts of the crimes recited above was received from the Commonwealth's witnesses. During the testimony of Dr. Frances Patricia Field, Assistant Chief Medical Examiner for the Northern Virginia District Medical Examiner's Office, the Commonwealth introduced the autopsy report regarding Stacey Reed. Included in the report was a narrative description of the circumstances surrounding Stacey's death made during the first examination of the body by a local medical examiner. That narrative included a notation that "neighbors saw [Stacey with] suspect approx. noon. Approx. 3:30-4:00 p.m. suspect seen [with] sister by neighbors." [4]

After the Commonwealth concluded its case-in-chief, Powell's counsel made a motion for a mistrial on the ground that the Commonwealth had failed to provide as part of its response to discovery the portion of the autopsy report that indicated neighbors had seen a "suspect" with each of the girls. Powell's counsel contended that had he been in possession of this information, he would have conducted his cross-examination of Kristie and Lewis differently.

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[4] There is some dispute as to whether the shorthand notation in the report is intended to be read as "with," as rendered here, or as "and." Regardless of which word was intended, the substance of the report is not materially altered.

Powell's counsel further contended that disclosure of the statement "would have opened up avenues of investigation, which might have led to further exculpatory information."

The Commonwealth responded that the exculpatory value of the narrative notation in the medical examiner's report was speculative at best. The Commonwealth noted that this narrative was created before the investigation of the crimes was complete and that the information in this particular section of the report did not reflect the personal knowledge of the medical examiner. During subsequent investigations, the police were unable to locate any witnesses who had seen Powell or anyone else with the sisters on that afternoon. The trial court overruled the motion for a mistrial, ruling that there was nothing exculpatory in the preliminary autopsy report and that it was mere speculation that the information in the report would have led to some exculpatory evidence. The trial court further noted that the objection to the report and the motion for mistrial were untimely, since no objection to the report had been raised at the time it was received into evidence.

Powell then made a motion to strike each of the charges against him. Relevant to the issues raised in these appeals, Powell argued that there was insufficient evidence to support the charge of abduction of Kristie because the restraint used did not exceed that necessary to accomplish the rape and attempted capital murder of her. With respect to the

charge of capital murder of Stacey during the commission of rape or attempted rape, Powell contended that the evidence showed that the rape of Kristie occurred after the murder of Stacey. Powell argued that because the indictment had used the phrase "during the commission of or subsequent to rape" the rape must proceed or be concurrent with the murder in order to provide the gradation crime necessary for enhancing first degree murder to capital murder. The Commonwealth stipulated that there was no evidence of sodomy or attempted sodomy. The trial court denied Powell's motion to strike.

Powell did not present any evidence and renewed his motion to strike, which the trial court again denied. The guilt-determination phase of the trial proceeded to jury instructions and closing arguments.

Relevant to the issues raised in these appeals, Powell objected to the Commonwealth's proffered instruction 5 which defined the phrase "during the commission of" rape as meaning that the rape occurred "before, during or after" the murder. Powell again asserted that the amended indictment charged that the murder occurred "during the commission of or subsequent to rape" and, thus, "the phrase they are dealing with is during, not before and not after." The Commonwealth responded that the instruction was a correct statement of law. The trial court granted the instruction.

Powell also objected to the Commonwealth's

proffered instruction 7, which, in part, stated that "it is immaterial whether the rape [of another victim] occurred before or after the death of the murder victim." Powell contended that a correct statement of law would include the further instruction that the rape and murder were "so closely related in time, place, and causal connection as to make the killing part of the same criminal enterprise as the" rape. However, Powell did not request that the trial court amend the Commonwealth's proffered instruction or proffer an instruction of his own on this point of law. The Commonwealth contended that its instruction was a correct statement of law under *Spencer v. Commonwealth,* 238 Va. 275, 285, 384 S.E.2d 775, 780 (1989), *cert. denied,* 493 U.S. 1036, 110 S. Ct. 759, 107 L. Ed. 2d 775 (1990). The trial court overruled the objection and granted the instruction.

In addition, Powell objected to the Commonwealth's proffered instruction 10, which defined "'[w]illful, deliberate, and premeditated' [as meaning] a specific intent to kill, adopted at some time before the killing, but which need not exist for any particular length of time." Powell contended that the instruction was "too concise a statement of the law." Powell proffered instruction U as an alternative:

> For the killing to be willful, deliberate, and premeditated, it is necessary that it [should] have been done on purpose, and not by accident, or without design; that the accused must have reflected with a view to determine whether he would kill or not; and that he must have

> determined to kill as the result of that reflection before he does the act-that is to say, the killing must be a premeditated killing upon consideration. The design to kill need not have existed for any particular length of time; it may [have] been formed at the moment of the commission of the act.

Powell contended that his instruction, which was drawn from language in *Pannill v. Commonwealth,* 185 Va. 244, 255, 38 S.E.2d 457, 463 (1946), was a more accurate statement of law. The Commonwealth responded that instruction 10, a "Model [Jury] Instruction," was "a more modern and concise statement of the principles of *Pannill,*" and asserted that the purpose of jury instructions "is to make the law as clear and understandable as possible" for the jurors. The trial court overruled Powell's objection, granted instruction 10, and refused instruction U.

During closing argument, the Commonwealth noted Powell had subsequently told others that he intended to steal property from the home and that he was looking for money to steal immediately after stabbing Stacey. Noting that Stacey was probably still alive at that time, the Commonwealth continued, "it's as likely as any scenario-but we'll never know because he hasn't told us."

Powell objected to this statement as soon as it was made, but the trial court directed that the objection would not be heard until closing argument had concluded. Once the Commonwealth completed its argument, Powell renewed his objection and moved

for a mistrial, contending that the Commonwealth had made an improper reference to Powell's failure to testify. The Commonwealth represented that the reference was to Powell's comments on the videotaped statement in which he denied having intended to rob Stacey. The trial court accepted this explanation, denied the motion for mistrial, and subsequently instructed the jury that Powell had an "absolute right" not to testify and that it "shall not consider his exercise of [that] right as evidence and shall not draw from it any inference whatsoever."

During its deliberations, the jury sent a question to the trial court seeking clarification whether the rape of Kristie could satisfy the gradation crime requirement for the capital murder of Stacey. The trial court initially indicated that it would respond in the negative because the rape was "too remote in time" from the murder. The Commonwealth argued that there was sufficient evidence from which the jury could find that Stacey's murder facilitated the subsequent rape of Kristie and, thus, that the rape was part of the same criminal enterprise as the murder.

Relying on *Coleman v. Commonwealth,* 226 Va. 31, 307 S.E.2d 864 (1983), *cert. denied,* 465 U.S. 1109, 104 S. Ct. 1617, 80 L. Ed. 2d 145 (1984), and *Spencer,* 238 Va. at 283, 384 S.E.2d at 779, the Commonwealth further argued that the jury need only find that Powell had the intent to rape Kristie when he killed Stacey. Powell contended that the jury's confusion stemmed from the instructions he

had previously objected to concerning the definition of the murder occurring "during" the commission of one or more of the gradation crimes. Powell further asserted that the evidence showed that "a significant period of time elapsed" between the murder and the rape.

The trial court gave the following response to the jury's question:

> Yes. Murder in [t]he [c]ommission of a rape is a killing which takes place before, during or after the rape and is so closely related thereto in time, place, and causal connection as to make the killing part of the same criminal enterprise as the rape.

After the trial court noted Powell's objection to the response to the jury, Powell's counsel asked "to be permitted to argue this new instruction." The trial court denied this request.

The jury returned verdicts convicting Powell of capital murder, attempted capital murder, rape, and abduction. Powell requested that the trial court poll the jury concerning unanimity of the capital murder conviction and also whether the gradation crime relied upon was robbery or rape. The jury responded that the conviction for capital murder was unanimous and that the gradation crime had been rape. Powell then requested "that the jury be polled ... as to whether they found the rape was committed before, during or after the act of murder." The trial court denied this request.

D: Penalty-Determination Phase

Before beginning the presentation of its evidence with regard to imposition of the death penalty, the Commonwealth renewed its motion to exclude testimony from Powell's mental health expert on the ground that Powell had refused to cooperate with the Commonwealth's mental health expert. Dr. Samenow was called as a witness out of the presence of the jury to give evidence in this regard. During his testimony, Dr. Samenow stated that during his second effort to interview Powell, a jail officer told him that Powell had refused to meet or speak with Dr. Samenow. Powell objected to this evidence as "[h]earsay." The trial court allowed the testimony.

Responding to the Commonwealth's motion, Powell's counsel asserted that in refusing to cooperate with Dr. Samenow, Powell was properly exercising his Fifth Amendment right against self-incrimination. Counsel further asserted that the trial court's order had limited Dr. Samenow's evaluation to a determination of Powell's sanity at the time of the offense. Therefore, because Powell's expert evidence in mitigation of the death sentence would not relate to Powell's guilt, it would be an abuse of discretion to refuse to allow that evidence for failure to comply with that order. The trial court ruled that Powell's expert witness would not be allowed to testify.

When the Commonwealth attempted to elicit testimony from a police officer concerning admissions made by Powell that he had committed a large

number of residential burglaries, Powell objected on the ground that the Commonwealth's intention to refer to these crimes had not been disclosed under Powell's discovery motion. The Commonwealth responded that while the specific acts had not been listed in a separate notice, the statements in which Powell made the admissions had been provided to the defense. The trial court permitted the evidence on the ground that the defense had actual notice of the Commonwealth's intent regarding this evidence from the statements provided.

Additional evidence presented by the Commonwealth relevant to sentencing included Powell's juvenile record, his admission that he had tortured and killed cats when he was younger, and evidence that he had threatened a jail officer and a prosecutor. At the conclusion of the Commonwealth's evidence, Powell made a motion to strike the evidence regarding the aggravating factor of future dangerousness and that of the vileness of the crime. The trial court denied the motion.

Powell's counsel made a motion for a competency evaluation of Powell on the ground that Powell had directed them to present no evidence in mitigation. Counsel proffered the evidence they would have presented and indicated that Powell's refusal to permit this evidence to be presented showed that he lacked the capacity to assist them in conducting his defense. Counsel conceded, however, that they had talked extensively with Powell about the matter, that Powell had stated his reasons for not wishing to

have any evidence in mitigation placed before the jury, and that "he has thought about this and ... understands the consequences and knows what he's doing." Counsel declined to state what Powell's reasons were, but nonetheless asserted that Powell's decision was the result of a "mental illness" which caused him to act in a manner contrary to his own best interests.

The Commonwealth responded that there was no probable cause to find that Powell lacked the capacity to understand the proceedings and knowingly and intelligently direct his counsel not to present mitigating evidence if that was his choice. The trial court ruled that Powell's refusal to follow his counsel's advice did not indicate a lack of capacity in light of the circumstances and denied the motion for a competency evaluation. Powell presented no evidence relevant to sentencing and renewed his motion to strike, which the trial court again denied.

The Commonwealth proffered instruction 28 on sentencing. The instruction advised the jury that it could impose a sentence of death, life imprisonment, or life imprisonment and a fine of up to $100,000 if it found either or both the aggravating factors to be present, and a sentence of life imprisonment or life imprisonment and a fine of up to $100,000 if the jury found neither aggravating factor to be present. Powell objected to this instruction, contending that it failed to "clearly advise the jury that even if they make one or both of these findings of aggravating factors that they are still entitled if they feel it's

justified to sentence the Defendant to not death but imprisonment for life." Powell proffered two instructions, Z and AA: the first stating the sentencing alternatives and the second stating the option to impose life imprisonment even where the jury found one or both of the aggravating factors to be present. The trial court overruled Powell's objection, finding that the Commonwealth's instruction was an accurate statement of the law and that Powell's instructions would unnecessarily duplicate instruction 28.

The Commonwealth proffered five penalty-phase verdict forms: one for the imposition of a sentence of death based upon a finding of both aggravating factors, one for the imposition of a sentence of death based upon a finding of future dangerousness only, one for the imposition of a sentence of death based upon a finding of vileness, one for the imposition of a life sentence, and one for the imposition of a life sentence and a fine of up to $100,000. These last two verdict forms made no mention of the presence or absence of aggravating factors. Each of the verdict forms directed the jury to consider all the evidence including evidence in mitigation.

Powell objected that the forms permitting a sentence of life imprisonment or life imprisonment and a fine were incomplete. Powell specifically argued that the jury "need[s] forms that indicate they can find one or both aggravating factors and still impose a punishment [of] imprisonment for life or a [punishment] of imprisonment for life and a fine of

[up to] $100,000." The trial court ruled that the Commonwealth's forms adequately provided the jury with a means to impose the sentences outlined in the sentencing instruction.[5]

The jury was instructed and heard argument regarding sentencing from Powell and the Commonwealth. Following deliberations, the jury rendered a verdict for a sentence of death for the capital murder based upon the vileness aggravating factor only. The jury was polled and was unanimous as to its verdict. On the non-capital offenses, the jury fixed Powell's punishment at life imprisonment and a fine of $100,000 for attempted capital murder, life imprisonment and a fine of $100,000 for abduction with intent to defile, and life imprisonment for rape.

E. Sentencing

Following the preparation of a pre-sentence report, the trial court held a sentencing hearing on August 10, 2000. Relevant to the issues raised in these appeals, at that hearing Powell called Jennifer M. Day, the foreperson of the jury in his trial, as a witness. Day testified that the trial court's response to the jury's inquiry during the guilt-determination phase had been "the determining factor" for her regarding whether Powell was guilty of capital

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[5] Powell further asserted that the verdict forms were improper because the description of the offense did not precisely track the language of the indictment. Powell does not reassert this issue on appeal.

murder. She further testified that she had not understood that a sentence of life imprisonment was an option even if the jury found that at least one of the aggravating factors was present. She testified that she would have voted to impose a life sentence had the jury been provided with a verdict form that specifically provided for a life sentence even with the finding of vileness.

On cross-examination, Day testified that she was a legal secretary and had "volunteered" to interpret the instructions provided to the jury for the other jurors. She further testified that she had read instruction 28 and understood that the jury was permitted to impose a life sentence even if it found one or both of the aggravating factors to be present. Day admitted that following the trial she began to feel "guilty" about the verdict and death sentence and was concerned that Powell's attorneys had not provided him with an adequate defense.

Day also testified that following the trial she began having regular contact with Powell through telephone calls, correspondence, and visits to the jail. Day, who is married, sent Powell material copied from the Internet including information on conjugal visits, sexually explicit jokes, and a "love horoscope." She denied wanting to have a physical relationship with Powell, indicating that she had told Powell they might be able to have contact visits only because she hoped this would give him a reason to live. Day also sent money to Powell, offered to assist him in finding new legal counsel, and specifically told Powell that

she would do what she could "to see that he did not get the death penalty."

Powell asserted that there was good cause to set aside the jury's sentence of death based upon Day's testimony. The trial court rejected Powell's assertion, finding that the jury instructions and sentencing forms were adequate and that Day's credibility was tainted by her relationship with Powell and her desire to help him avoid the death penalty. By order entered September 6, 2000, the trial court confirmed the jury's verdicts and sentences.

We consolidated the automatic review of Powell's death sentence with his appeal of the capital murder conviction. Code § 17.1-313(F). Powell's appeal of his non-capital convictions was certified from the Court of Appeals, Code § 17.1-409, consolidated with his capital murder appeal, and the consolidated appeals were given priority on our docket.

III. DISCUSSION

Powell raises twenty-five assignments of error in these consolidated appeals regarding his capital murder conviction and his non-capital convictions, and we have carefully considered each of them. However, because we are of opinion that several issues raised are dispositive of, or necessary to, our ultimate holding that Powell's capital murder conviction will be reversed and his non-capital convictions will be affirmed, we will not address all

of Powell's assignments of error.[6] In addition, we take the opportunity provided by this case to address several other issues that are critical to the proper prosecution of capital murder cases and will be instructive to such future cases.

A. Constitutional Challenges to Capital Punishment Statutes

Powell assigns error to the trial court's denial of his motion to have the Virginia death penalty statute and the statutory scheme under which capital murder trials are conducted and death sentences are reviewed on appeal declared unconstitutional. To the extent that this assignment of error remains pertinent to Powell's conviction of attempted capital murder, we have addressed and rejected in prior capital murder cases the specific arguments raised in

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[6] The issues raised that we need not address are: the failure of the trial court to strike the Commonwealth's evidence as to vileness; the admission of hearsay evidence concerning Powell's failure to cooperate with the Commonwealth's mental health expert; the granting of the Commonwealth's motion to exclude the testimony of Powell's mental health expert; the admission of evidence of Powell's unadjudicated conduct; the trial court's denial of Powell's motion for a competency evaluation based upon his desire not to have his counsel present mitigating evidence; the trial court's failure to give Powell's proffered instructions on sentencing; and the trial court's failure to set aside the death sentence. Similarly, because we will not be required to conduct the review of the death sentence under Code § 17.1-313(C), the assignments of error corresponding to the issues to be considered in the statutory review are also moot.

it, and we find no reason to modify our previously expressed views on these issues:

(1) Virginia's two statutory aggravating factors of "future dangerousness" and "vileness" are not unconstitutionally vague. *Beck v. Commonwealth,* 253 Va. 373, 387, 484 S.E.2d 898, 907,*cert. denied,* 522 U.S. 1018, 118 S. Ct. 608, 139 L. Ed. 2d 495 (1997) ("vileness"); *Clagett,* 252 Va. at 86, 472 S.E.2d at 267 ("future dangerousness").

(2) Virginia's penalty-determination phase instructions adequately inform the jury regarding the concept of mitigation. *Swann v. Commonwealth,* 247 Va. 222, 228, 441 S.E.2d 195, 200,*cert. denied,* 513 U.S. 889, 115 S. Ct. 234, 130 L. Ed. 2d 158 (1994).

B. Amendment of Indictment

Powell assigns error to the trial court's overruling his objection to the Commonwealth's motion to amend the indictment charging him with capital murder of Stacey in the commission of a robbery and/or attempted robbery to include an alternative and additional count of capital murder "during the commission of or subsequent to rape and/or attempted rape and/or sodomy and/or attempted sodomy." Powell contends that by this amendment, the Commonwealth impermissibly expanded the nature and character of the charges against him. The Commonwealth responds that the amendment of the indictment was permissible under Code § 19.2-231

because it did not change the nature of the offense charged. The Commonwealth contends that the offense charged continued to be capital murder and that the amendment merely placed Powell on notice that the Commonwealth would seek to use the offense of rape as a gradation crime to prove capital murder.

Code § 19.2-231 provides:

> If there be any defect in form in any indictment, presentment or information, or if there shall appear to be any variance between the allegations therein and the evidence offered in proof thereof, the court may permit amendment of such indictment, presentment or information, at any time before the jury returns a verdict or the court finds the accused guilty or not guilty, provided the amendment does not change the nature or character of the offense charged. After any such amendment the accused shall be arraigned on the indictment, presentment or information as amended, and shall be allowed to plead anew thereto, if he so desires, and the trial shall proceed as if no amendment had been made; but if the court finds that such amendment operates as a surprise to the accused, he shall be entitled, upon request, to a continuance of the case for a reasonable time.

The statute is remedial in nature and is to be liberally construed in order to achieve the laudable purpose of avoiding further unnecessary delay in the criminal justice process by allowing amendment,

rather than requiring reindictment by a grand jury. *Sullivan v. Commonwealth,* 157 Va. 867, 876-77, 161 S.E. 297, 300 (1931). The amendment, when allowed, must provide that the substantial rights of the accused are protected by informing him of the nature and character of the accusations. *Id.* As a rule, amendments to correct a variance between the allegation of the indictment and the proof occur after the Commonwealth has presented a portion or all of its case, placing the trial court in a position to judge whether that proof would be adequate to support the return of the amended indictment. *See, e.g., Thomas v. Commonwealth,* 256 Va. 38, 42, 501 S.E.2d 391, 393 (1998) (amendment after trial but prior to return of verdict).

Here, there is no allegation by the Commonwealth that the amendment was intended to correct a defect in form. Indeed, there was no such defect. Accordingly, the issue we must determine is whether the pre-trial amendment of an indictment charging one theory of capital murder to include an alternative and additional theory of capital murder constitutes an amendment contemplated by the provisions of Code § 19.2-231 to correct a variance between the allegation of the original indictment and the proof the Commonwealth expects to adduce at the subsequent trial. For the following reasons, we hold that the particular amendment made to the indictment in this case was not authorized by Code § 19.2-231.

Under the original indictment returned by the grand

jury in this case, Powell was charged with a single count of capital murder in which the gradation crime was the commission or attempted commission of robbery, a violation of Code § 18.2-31(4). In amending the indictment, the Commonwealth used the term "and/or" to charge two new gradation crimes, the commission or attempted commission of rape and the commission or attempted commission of sodomy, either of which would constitute a violation of Code § 18.2-31(5). In doing so, the Commonwealth did not simply correct a variance between the original allegation and the proof it expected to adduce at trial. Rather, by use of the term "and/or," the Commonwealth expanded the indictment to include a new and additional charge of capital murder. *See Bailey v. Commonwealth,* 259 Va. 723, 747, 529 S.E.2d 570, 584, *cert. denied,* 531 U.S. 995, 121 S. Ct. 488, 148 L. Ed. 2d 460 (2000). As a result, under the amended indictment Powell could have been convicted and sentenced on one count of capital murder under Code § 18.2-31(4) and another count of capital murder under Code § 18.2-31(5).[7] *Id.*

Although the same grand jury also indicted Powell for the rape of Kristie, it was never called upon to consider that offense as the gradation crime for the

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[7] It is irrelevant that the Commonwealth did not expressly seek separate convictions for the two counts of capital murder or that Powell was acquitted of capital murder in the commission of robbery and, thus, was not actually subject to an increased punishment. We are not here concerned with the outcome of the trial on the amended indictment, but whether the amendment of the indictment was proper.

capital murder of Stacey. Similarly, nothing in the record suggests that the grand jury heard any evidence with respect to the gradation crime of sodomy. The record as a whole is devoid of any evidence that Powell attempted to rape or sodomize Stacey, despite Powell's subsequent claim that he attempted to initiate consensual sexual relations with her. Thus, the amendment to the indictment was premised upon allegations not previously considered by the grand jury. It is "the province of the grand jury [under Code § 19.2-191] to ascertain from the evidence adduced whether or not" the evidence will sustain the charge brought. *Evans v. Commonwealth,* 183 Va. 775, 780, 33 S.E.2d 636, 638 (1945).

Accordingly, despite the liberal construction afforded to promote the remedial purpose of Code § 19.2-231, and because the amended indictment materially changed the nature of the offense originally charged, we hold that the trial court erred in permitting the Commonwealth to amend the indictment for capital murder. Thus, Powell's conviction for capital murder under the amended indictment cannot stand.

Although our determination that the amendment of the indictment was error and will necessitate reversal of Powell's conviction for capital murder, we must nonetheless consider other issues that may have relevance to any trial on remand for the murder offense and the issues raised by the appeal of Powell's convictions for the non-capital offenses. We turn now to address those issues in the order in

which they arose at trial.

C. Jury Selection

Powell assigns error to the trial court's striking for cause of juror O'Dell and failing to strike for cause jurors Tilley, Neal, and Henderson. Powell also assigns error to the trial court's limiting of his questions during voir dire and to the trial court's seating of the jury panel following the limiting of his voir dire. To the extent that the selection of the jury is an issue impacting Powell's non-capital convictions, we will address the issues raised in these assignments of error.

Powell contends that juror O'Dell should have been retained in the venire because she did not expressly state that she would be unable to impose the death penalty. Contrary to Powell's contention, however, the record reveals that O'Dell did not merely express reservations about the death penalty. Rather, she affirmatively stated that she had not made up her mind as to whether she would be able to follow the trial court's instructions and consider all possible sentencing options including a sentence of death. She indicated that she would not reach a decision on whether she would be able to follow the trial court's instructions and consider imposing a sentence of death until sometime later in the trial. Under these circumstances, we cannot say that the trial court abused its discretion in striking O'Dell from the venire. *Barnabei v. Commonwealth,* 252 Va. 161, 173, 477 S.E.2d 270, 277 (1996), *cert. denied,* 520

U.S. 1224, 117 S. Ct. 1724, 137 L. Ed. 2d 845 (1997).

Powell contends that jurors Tilley, Neal, and Henderson should have been removed from the venire because each indicated, in response to questions asked by his counsel, that they would not consider evidence in mitigation if called upon to consider whether to impose a sentence of death. Powell further contends that the trial court erred when it subsequently prohibited him from making similar inquiries to the remaining members of the venire. Powell's contentions misrepresent the nature of the questions and the responses given by the three prospective jurors.

In conducting our review, we consider the jurors' entire voir dire, not merely isolated statements. *Clagett,* 252 Va. at 90, 472 S.E.2d at 269; *Mackall v. Commonwealth,* 236 Va. 240, 252, 372 S.E.2d 759, 767 (1988), *cert. denied,* 492 U.S. 925, 109 S. Ct. 3261, 106 L. Ed. 2d 607 (1989). Each juror had previously indicated in response to questions from the trial court and counsel that he or she would be able to follow the trial court's instructions and consider all the evidence, including evidence in mitigation, when considering whether to impose a death sentence. The nature of the questions Powell's counsel asked and the responses of the three jurors did not relate to whether the jurors would consider evidence in mitigation, but whether specific mitigating factors "[w]ould ... prevent [the juror] from imposing the death penalty." Such questions are improper in voir dire because they are not

relevant to a determination of whether a juror has a particular bias or prejudice, but instead attempt to elicit the juror's views on specific types of evidence. *LeVasseur v. Commonwealth,* 225 Va. 564, 580-81, 304 S.E.2d 644, 653 (1983), *cert. denied,* 464 U.S. 1063, 104 S. Ct. 744, 79 L. Ed. 2d 202 (1984). "The court must afford a party a full and fair opportunity to ascertain whether prospective jurors 'stand indifferent in the cause,' but the trial judge retains the discretion to determine when the parties have had sufficient opportunity to do so." *Id.* at 581, 304 S.E.2d at 653.

In summary, there is no merit to Powell's challenges to the selection of the jury in this case. We hold that the trial court did not abuse its discretion in striking O'Dell, in refusing to strike Tilley, Neal, and Henderson, in limiting the voir dire of the remaining members of the venire, and in seating the jury panel.

D. Discovery Violation

Powell assigns error to the trial court's failure to grant his motion for mistrial on the ground that the Commonwealth failed to disclose the contents of the preliminary autopsy report under *Brady v. Maryland,* 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). We hold that the trial court properly ruled that Powell's motion for mistrial was untimely. The trial court does not abuse its discretion in denying a new objection raised to previously admitted evidence after the Commonwealth has

rested its case.[8] *Lovitt v. Commonwealth,* 260 Va. 497, 512, 537 S.E.2d 866, 876 (2000).

E. Guilt-Determination Phase Jury Instructions and Jury Inquiry

Powell assigns error to the trial court's granting of Commonwealth's instructions 5, 7, and 10 and in refusing his instruction U.[9] Powell further assigns error to the answer given by the trial court in response to the jury inquiry for clarification whether the rape of Kristie could serve as the gradation crime for the capital murder of Stacey.

The thrust of all these objections is Powell's contention that under the wording of the amended indictment, the Commonwealth was limited to proving that the killing of Stacey occurred "during the commission of or subsequent to" the rape of Kristie, and not, as the trial court instructed the jury, that the killing occurred "*before,* during, or after" that rape. (Emphasis added). The

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[8] In light of our holding that the trial court was correct in overruling the motion as untimely, we need not address the trial court's further determination that the motion was without merit.

[9] Powell also assigned error to the trial court's granting of instructions 4 and 6 and refusing his instruction Y. On brief, Powell concedes that his objections concerning instructions 4 and Y are mooted by his acquittal on the charge of capital murder in the commission of robbery. Similarly, any error in granting instruction 6, which also related only to the charge of capital murder in the commission of robbery, is moot.

Commonwealth concedes that the language of the amended indictment fails to track the current wording of Code § 18.2-31(5), which provides for a premeditated killing "*in* the commission of, or subsequent to, rape." (Emphasis added). It contends, however, that the phrase "during the commission of, or subsequent to" does not limit the offense charged under the amended indictment because that phrase includes the commission of a rape after the murder. We disagree with the Commonwealth.

An indictment is a written charge against the accused for a specific crime that informs the accused of the nature and character of the offense charged against him. Code § 19.2-220. "It is elementary that what need not be proved need not be alleged, but sometimes ... [the indictment] alleges something that it was not necessary to allege," requiring proof of "what ... has [been] alleged unless the unnecessary allegation can be rejected as surplusage." *Mitchell v. Commonwealth,* 141 Va. 541, 555, 127 S.E. 368, 373 (1925). "If the unnecessary word or words inserted in the indictment describe, limit or qualify the words which it was necessary to insert therein, then they are descriptive of the offense charged in the indictment and cannot be rejected as surplusage." *Id.* at 560, 127 S.E. at 374.

Code § 18.2-31(e), as the current subsection (5) was formerly designated, originally defined capital murder as the willful, deliberate, and premeditated killing of a person "during the commission of, or subsequent to, rape." In *Harward v. Commonwealth,*

229 Va. 363, 330 S.E.2d 89 (1985), comparing this language to language used in other subsections of Code § 18.2-31, we held that "[t]he phrase 'in the commission of' includes a killing before, during, and after the underlying felony, while the language 'during the commission of, or subsequent to' excludes a killing which occurs before a rape" of another person. *Id.* at 366, 330 S.E.2d at 91. In response to *Harward,* the General Assembly in 1988 amended subsection (e) to define the requisite killing to constitute capital murder as one "in the commission of, or subsequent to, [the] rape" of any person.

The Commonwealth contends that the discussion in *Harward* of the distinction between "during the commission of, or subsequent to" and "in the commission of" is *dictum,* and that we have subsequently rejected the distinction in *Spencer,* 238 Va. at 286, 384 S.E.2d at 781, relying on *Coleman,* 226 Va. at 51, 307 S.E.2d at 875. The Commonwealth's reliance on *Spencer* and *Coleman* is misplaced in the present case. In *Spencer* and *Coleman,* the issue was whether the evidence failed to show that the murder victim was alive at the time of the rape, not whether the rape *of another person* occurring after the death of the murder victim could serve as the gradation crime for capital murder.

It remains a valid principle that the Commonwealth is limited to the prosecution of the crime charged in the indictment because the accused is entitled to notice of the offense charged. Thus, in the present case, once the Commonwealth chose, for whatever

reason, to depart from the language of Code § 18.2-31(5) and to insert into the amended indictment the exact language that had been interpreted in *Harward* to exclude the killing of the murder victim before the rape of another person, it became bound to the more limited proof that the gradation crime was a rape occurring before or during the killing. Accordingly, we hold that the trial court erred in instructing the jury that the gradation crime of rape was one occurring "before, during, or after" the murder and in subsequently responding to the jury inquiry that the rape of Kristie, which according to the evidence occurred after the killing of Stacey, could serve as the gradation crime for the capital murder of Stacey.[10]

F. Comment on Powell's Failure to Testify

Powell assigns error to the trial court's failure to grant a mistrial following the Commonwealth's alleged reference in closing argument to Powell's failure to testify. Powell asserts the statement made by the Commonwealth's Attorney referred to Powell's "failure to tell [the jury] what his intent or motive was" for killing Stacey and "went to the central issue of the capital murder charge" only. Accordingly, we will consider this issue in that context.

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[10] Because the trial court's response to the jury inquiry was erroneous, we need not address Powell's contention that the trial court erred in failing to permit him to present argument to the jury following that response being given.

As a general rule, any comment that the Commonwealth's Attorney made referring to the defendant's election not to testify is a violation of his right against self-incrimination as guaranteed by the Fifth Amendment of the United States Constitution, *Griffin v. California,* 380 U.S. 609, 615, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), and Article I, Section 8 of the Constitution of Virginia and as explicated in Code § 19.2-268, *Elliott v. Commonwealth,* 172 Va. 595, 598-601, 1 S.E.2d 273, 274-76 (1939). A comment is constitutionally and statutorily forbidden if "'the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *Hines v. Commonwealth,* 217 Va. 905, 907, 234 S.E.2d 262, 263 (1977) (quoting *Knowles v. United States,* 224 F.2d 168, 170 (10th Cir. 1955)).

Contrary to the Commonwealth's assertions at trial and in this Court, the context of the statement by the Commonwealth's Attorney does not clearly reference Powell's videotaped confession that he had raped Kristie and stabbed both Stacey and Kristie, but that he had not taken any money from their house. Although the Commonwealth's Attorney had mentioned Powell's admission in this videotape earlier in his argument, the issue here arose when he was arguing that the evidence, specifically Kristie's testimony and that of her mother, supported finding that Powell was rummaging through Stacey's possessions looking for money to steal as she lay dying "in a pool of blood." The Commonwealth's

Attorney then stated:

> If you don't think [Stacey] kept money in her underwear drawer, acquit him. If you think her mother made that up, acquit him. But that's not the evidence.
>
> I'll say this to you[,] it's as likely as any scenario but we'll never know because he hasn't told us....

At that point, Powell's counsel interposed his objection, and the trial court directed that the objection would not be considered until the Commonwealth's argument concluded. The Commonwealth's Attorney then resumed his argument, asserting that after "letting [Stacey's] life's blood drain out," Powell "[g]oes and takes her money, goes through [her] house."

While it is not implausible that the Commonwealth's Attorney intended the statement "he hasn't told us" to refer to Powell's express denial that he had looked for money or something else to steal after stabbing Stacey, it is more likely that the jury would have taken the statement to be a comment on the failure of Powell to testify and offer rebuttal to the evidence to which the prosecutor had just alluded. Accordingly, we hold that the trial court erred in failing to find that the statement was an improper comment on Powell's failure to testify concerning his motive to kill Stacey.

However, Powell was ultimately acquitted of capital

murder in the commission of robbery or attempted robbery and the associated charge of robbery or attempted robbery, and his conviction will be reversed on other grounds for the other capital murder charge. Accordingly, we hold that the trial court's error was harmless beyond a reasonable doubt. *Dunn v. Commonwealth,* 222 Va. 750, 753, 284 S.E.2d 807, 809 (1981).

G. Sufficiency of the Evidence

Powell assigns error to the trial court's failure to strike the evidence as to the abduction of Kristie on the ground that the evidence was insufficient to support a jury finding that the restraint used exceeded that necessary to accomplish the crime of rape. We disagree.

A defendant may be convicted of abduction in addition to "another crime involving restraint of the victim, both growing out of a continuing course of conduct, ... only when the detention committed in the act of abduction is separate and apart from, and not merely incidental to, the restraint employed in the commission of the other crime." *Brown v. Commonwealth,* 230 Va. 310, 314, 337 S.E.2d 711, 713-14 (1985). Here, there is sufficient evidence to support the finding of the jury that Powell used greater restraint than was necessary to commit rape.[11] First, Powell ordered Kristie to go to a more

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[11] Restraint is not a necessary element of homicide. Thus, Powell's contention that the restraint of Kristie was not more

secluded part of the home prior to the rape. *See, e.g., Wilson v. Commonwealth,* 249 Va. 95, 103, 452 S.E.2d 669, 675, *cert. denied,* 516 U.S. 841, 116 S. Ct. 127, 133 L. Ed. 2d 76 (1995). Although Powell did not display a weapon to her at that time, it is clear under the circumstances that Kristie was in reasonable fear for her life having just discovered her sister's lifeless body and being aware that Powell was usually armed. Moreover, after the rape was complete, Powell bound Kristie and left her for some time before returning to attempt to kill her. This restraint clearly exceeded that necessary to accomplish the rape. *See Hoke v. Commonwealth,* 237 Va. 303, 311, 377 S.E.2d 595, 600, *cert. denied,* 491 U.S. 910, 109 S. Ct. 3201, 105 L. Ed. 2d 709 (1989). Accordingly, we hold that the trial court did not err in failing to strike the evidence as to the charge of abduction.

Within the same assignment of error, Powell also asserts that the evidence was insufficient to support his conviction for the capital murder of Stacey "during the commission of or subsequent to" the rape of Kristie. There is simply no evidence upon which the jury could have found that Powell committed the rape of Kristie before or during the murder of Stacey. Indeed, it is undisputed that the rape occurred after the murder was completed. Accordingly, the evidence was insufficient to support Powell's conviction for capital murder as charged in the amended

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than what was necessary incident to his attempt to kill her is without merit.

indictment.[12]

H. Penalty-Determination Phase

Although we have already determined that the conviction underlying Powell's death sentence will be reversed, we now turn to an issue raised by Powell during the penalty-determination phase of his trial which is critical to the proper prosecution of capital murder cases and will be instructive to future capital murder trials.

Powell assigns error to the trial court's failure to grant his request that the jury be given verdict forms which expressly stated the jury's option of imposing a life sentence or a life sentence and a fine where the jury found one or both of the aggravating factors to be present. We note that this case presents the first opportunity to address this issue which was properly preserved by an objection to the failure of the trial court to provide the jury with such verdict forms.[13]

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[12] For the reasons previously stated in this opinion, Powell's conviction for that crime will be reversed, and he will not be subject to retrial for that offense. Accordingly, we need not address the error assigned to the trial court's failure to poll the jury with respect to whether the rape occurred before, during, or after the murder.

[13] In considering this issue, we disregard the testimony of the jury foreperson received during the sentencing hearing that she did not understand the trial court's instruction on sentencing because the verdict forms failed to contain express reference to the imposition of a life sentence where the jury found one or both of the aggravating factors to be present. We concur in the trial court's observation that her testimony is tainted by her

Cf. Burns v. Commonwealth, 261 Va. 307, 343 n.16, 541 S.E.2d 872, 896 n.16 (2001); *Orbe v. Commonwealth,* 258 Va. 390, 403 n.13, 519 S.E.2d 808, 816 n.13 (1999), *cert. denied,* 529 U.S. 1113, 120 S. Ct. 1970, 146 L. Ed. 2d 800 (2000). In both *Orbe* and *Burns,* we held that the failure to object to the nature of the verdict forms at trial barred consideration of that issue on appeal. In *Orbe,* we went on to state that "[t]he defendant based his motion [to assert the issue for the first time on appeal] on the recent decision of this Court in *Atkins v. Commonwealth,* 257 Va. 160, [179,] 510 S.E.2d 445[, 457] (1999).... [W]e note that the verdict form in this case did not have the problem addressed in *Atkins.*" *Orbe,* 258 Va. at 403 n.13, 519 S.E.2d at 816 n.13.

In *Atkins,* the jury, although properly instructed as to the sentencing options available, was not provided with a verdict form which allowed it to impose a life sentence or life sentence and a fine if it found that neither of the aggravating factors had been proven beyond a reasonable doubt. We held that this omission resulted in the jury being "presented with a confusing situation in which the trial court's instructions and the form the jury was given to use in discharging its obligations were in conflict." *Atkins,* 257 Va. at 179, 510 S.E.2d at 457.

The Commonwealth asserts that, unlike *Atkins,* the

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subsequent relationship with Powell.

jury in the present case was provided with forms that would have allowed it to discharge its obligations because the forms provided to the jury comported with the required language of Code § 19.2-264.4(D). The Commonwealth further contends that because we have held that the sentencing verdict forms prescribed by Code § 19.2-264.4(D) are not unconstitutionally vague, the trial court has the discretion to reject a defendant's request for an alternative form. *See Roach v. Commonwealth,* 251 Va. 324, 336, 468 S.E.2d 98, 105,*cert. denied,* 519 U.S. 951, 117 S. Ct. 365, 136 L. Ed. 2d 256 (1996).

Code § 19.2-264.4(D) provides:

> The verdict of the jury shall be in writing, and in one of the following forms:
>
> (1) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.
>
> Signed ....., foreman"

or

(2) "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and having considered all of the evidence in aggravation and mitigation of such offense, fix his punishment at imprisonment for life.

Signed ....., foreman"

We begin by noting that the statute makes no reference to the alternative sentence of imprisonment for life and a fine of not more than $100,000. Originally, the punishment for capital murder was limited to the options of a sentence of death or one of life imprisonment. In 1991, the General Assembly amended Code § 18.2-10 in include the additional option of imposing a fine of not more than $100,000 in addition to a sentence of life imprisonment.[14] At that time, the General Assembly failed to amend Code § 19.2-264.4(D) to reflect this change in the range of sentences available for capital murder and the two statutes have since remained in conflict.[15]

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[14] A fine may not be imposed in addition to a sentence of death. Code § 18.2-10(g).

[15] We note further that the description of the aggravating factors in Code § 19.2-264.4(D)(1) is also erroneous. First, the two factors are listed in the disjunctive although it is possible for the jury to find that a death sentence is warranted upon finding that both aggravating factors have been proven beyond a reasonable doubt. Second, although the description of the

Because these statutes are in conflict, we must resort to rules of statutory construction to determine which should control. *Wertz v. Grubbs,* 245 Va. 67, 70, 425 S.E.2d 500, 501 (1993); *see also Moore v. Commonwealth,* 155 Va. 1, 11, 155 S.E. 635, 638 (1930). "In such circumstances as this, we have employed the established rule of statutory construction that when one statute speaks to a subject generally and another deals with an element of that subject specifically, the statutes will be harmonized, if possible, and if they conflict, the more specific statute prevails." *Commonwealth v. Brown,* 259 Va. 697, 706, 529 S.E.2d 96, 101 (2000). Clearly, Code § 18.2-10, the statute that prescribes the punishment for capital murder, is the more specific of the two and, accordingly, it must prevail. Thus, we hold that, at a minimum, the jury must receive a verdict form that, in addition to addressing the imposition of a sentence of death and the imposition of a sentence of life imprisonment, also allows the jury to impose a sentence of life imprisonment and a fine of up to $100,000. *Cf. Lenz v. Commonwealth,* 261 Va. 451, 472, 544 S.E.2d 299, 308 (2001) (holding that failure to object to absence of verdict form

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future dangerousness aggravating factor is set out in a parenthetical, indicating that the language need not be used if not appropriate to the circumstances, only a portion of the description of the vileness aggravating factor is within a parenthetical, implying that the language "his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved" is required as part of the verdict form even where vileness is not at issue.

providing for imposition of life sentence and a fine barred consideration of issue on appeal).

During oral argument of these appeals, the Commonwealth contended that, since it had included among its verdict forms ones that would have permitted the imposition of a sentence of life imprisonment and a sentence of life imprisonment and a fine, there is no " *Atkins* problem" in this case because there was no conflict between "the trial court's instructions and the form[s] the jury was given to use in discharging its obligations." *Atkins,* 257 Va. at 179, 510 S.E.2d at 457. In other words, the Commonwealth contends that, so long as the jury was presented with verdict forms that allowed it to impose each of the legal sentences for capital murder, it was not error for the trial court to provide verdict forms that failed to expressly reflect its instruction that the jury had the option of imposing a life sentence or a life sentence and a fine where the jury found one or both of the aggravating factors to be present.

As in *Orbe,* we agree that this issue is not controlled by *Atkins.* However, we did not reach this issue in *Atkins* because the verdict forms that were provided to the jury in that case expressly provided that the jury had the option of imposing a life sentence or a life sentence and a fine if it found one or both of the aggravating factors to be present. In *Orbe* and *Burns* this issue was not properly preserved. Here, Powell made a proper request to have such language included in the verdict forms provided to the jury.

The issue is not whether the jury was provided with the means to discharge its obligation. If that were the only goal, it could be achieved by providing the jury with a generic verdict form and advising the jury to fill in the particulars of the sentence from the instructions. Rather, the issue is whether the jury is likely to be confused where it is instructed that it may impose a sentence other than death if it finds one or both of the aggravating factors have been proven beyond a reasonable doubt, but receives verdict forms that do not expressly state that the jury is allowed to fix a sentence of life imprisonment even though one or both aggravating factors are present.

The rationale of *Atkins* flows from the principle that "it is materially vital to the defendant in a criminal case that the jury have a proper verdict form." *Atkins,* 257 Va. at 178, 510 S.E.2d at 456. That rationale may be extended to the provision of jury verdict forms with sentencing options that accurately and expressly correspond to the trial court's sentencing instruction. Accordingly, we hold that in a capital murder trial, the trial court must give the jury verdict forms providing expressly for the imposition of a sentence of imprisonment for life and a fine of not more than $100,000 when the jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt.

IV. CONCLUSION

Having already determined that Powell's conviction for capital murder will be reversed, we now further determine that there is no basis upon which Powell can be retried for capital murder on remand. The poll of the jury establishes that Powell was acquitted of the charge of capital murder in the commission of robbery or attempted robbery. It is equally clear that there is simply no evidence upon which the jury could have relied to find that Powell committed or attempted to commit any sexual assault against Stacey before or during her murder, or that the rape of Kristie did not occur after the murder of her sister. Accordingly, under the circumstances of this case, the evidence at best would have supported a conviction for first degree murder.

For these reasons, we will reverse Powell's conviction for capital murder, affirm his convictions for abduction, rape, attempted capital murder, and grand larceny, and remand the case for a new trial on a charge of no greater than first degree murder for the killing of Stacey Reed, if the Commonwealth be so advised.

Affirmed in part, reversed in part, and remanded.

Appendix F

Date Filed: May 12, 2009

United States Court of Appeals,
Fourth Circuit.

No. 08-3
(1:07-cv-00059-TSE-TRJ)

Paul Warner POWELL, Petitioner-Appellant,

v.

Loretta K. KELLY, Warden, Sussex I State Prison, Respondent-Appellee.

ORDER

The Court denies the petition for rehearing and rehearing en banc. No poll was requested on the petition.

Entered at the direction of Judge Shedd with the concurrence of Judge Motz. Judge Gregory voted to grant the petition.

For the Court

/s/ Patricia S. Connor, Clerk

Appendix G

12/03/01

COMMONWEALTH OF VIRGINIA
VS.
PAUL WARNER POWELL

INDICTMENT FOR A FELONY
(Capital Murder)
51894

THE GRAND JURY for the 31st Judicial Circuit, comprising the County of Prince William and the Cities of Manassas and Manassas Park, charges that on or about January 29, 1999, in the aforesaid Judicial Circuit, the accused, PAUL WARNER POWELL, did feloniously, willfully, deliberately and premeditatedly kill and murder one Stacey Lynn Reed during the commission of or subsequent to the attempted rape of Stacey Lynn Reed, in violation of Virginia Code Section 18.2-31.

A TRUE BILL
~~NOT A TRUE BILL~~
(Strike Out One)

/s/
FOREMAN

WITNESSES summonsed by the Commonwealth, sworn and sent to testify before the Grand Jury:

LIEUTENANT R. LEONARD

Presented By:

/s/
PAUL B. EBERT
Attorney for the Commonwealth
County of Prince William

Appendix H

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

COMMONWEALTH OF VIRGINIA	:	CRIMINAL NOS. 45693-70 45704, 45705
vs.	:	
PAUL WARNER POWELL	:	

A N S W E R

COMES NOW the Commonwealth, by her counsel, and answers the Bill of Particulars previously filed herein and states as follows:

1. The victims of the robbery and/or attempted robbery are Stacie Reed and/or Kristie Reed.

2. The victim of the rape, attempted rape, forcible sodomy and attempted forcible sodomy is Kristie Reed.

Having fully answered the defendant's Bill of Particulars, the Commonwealth files this, her Answer.

COMMONWEALTH OF VIRGINIA

/s/ James A. Willett
JAMES A. WILLETT, Assistant
Commonwealth's Attorney
Country of Prince William
9311 Lee Avenue
Manassas, VA 22110

CERTIFICATE

I hereby certify that a true copy of the foregoing Answer was mailed, postage prepaid, to Ronald Wayne Fahy, 9236 Mosby Street, Manassas, VA 20110 and Daniel Morissette, 9843 Business Way, Manassas, VA 20110 this 16th day of November, 1999

/s/ James A. Willett
JAMES A. WILLETT, Assistant
Commonwealth's Attorney

Appendix I

COMMONWEALTH OF VIRGINIA	AMENDED INDICTMENT FOR A FELONY
VS.	(Capital Murder)
PAUL WARNER POWELL	# 45693

THE GRAND JURY for the 31st Judicial Circuit, comprising the County of Prince William and the Cities of Manassas and Manassas Park, charges that on or about January 29, 1999, in the aforesaid Judicial Circuit, the accused, PAUL WARNER POWELL, did feloniously, willfully, deliberately and premeditatedly kill and murder one Stacey Lynn Reed while in the commission of robbery and/or attempted robbery, and/or during the commission of or subsequent to rape and/or attempted rape and/or forcible sodomy and/or attempted forcible sodomy, in violation of Virginia Code Section 18.2-31.

05/03/99

COMMONWEALTH OF VIRGINIA
VS.
PAUL WARNER POWELL

INDICTMENT FOR A FELONY
(Capital Murder)
45693

THE GRAND JURY for the 31st Judicial Circuit, comprising the County of Prince William and the Cities of Manassas and Manassas Park, charges that on or about January 29, 1999, in the aforesaid Judicial Circuit, the accused, PAUL WARNER POWELL, did feloniously, willfully, deliberately and premeditatedly kill and murder one Stacey Lynn Reed while in the commission of robbery, while armed with a deadly weapon, in violation of Virginia Code Section 18.2-31.

A TRUE BILL
~~NOT A TRUE BILL~~
(Strike Out One)

/s/
FOREMAN

WITNESSES summonsed by the Commonwealth, sworn and sent to testify before the Grand Jury:

DETECTIVE R. J. LEONARD

Presented By:

/s/
PAUL B. EBERT
Attorney for the Commonwealth
County of Prince William

Appendix J

INSTRUCTION NO. 4

The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

1. That the defendant killed Stacie Reed; and

2. That the killing was willful, deliberate and premeditated; and

3. That the killing occurred during the commission of robbery and/or attempted robbery and/or during the commission of, or subsequent to rape.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty of capital murder and shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the first two elements of the offense as charged and that the killing was malicious but you do not find beyond a reasonable doubt that the killing occurred during the commission of robbery and/or attempted robbery and/or during the commission of, or subsequent to rape, then you shall find the defendant guilty of first degree murder but you shall not fix the punishment until your verdict has been

returned and further evidence has been heard by you.

If you find from the evidence that the Commonwealth has failed to prove that the killing was deliberate and premeditated, but the killing was willfully committed during the commission of robbery or attempted robbery and/or rape or attempted rape, you shall find the defendant guilty of first degree murder. You shall not fix his punishment until further evidence is heard by you.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt the following:

1. That the defendant killed Stacie Reed; and

2. That the killing was malicious;

but you do not find beyond a reasonable doubt that the killing was willful, deliberate and premeditated, or that it was not deliberate and premeditated but that it was willfully committed during the commission of robbery or attempted robbery and/or during the commission of rape or attempted rape, then you shall find the defendant guilty of second degree murder, but you shall not fix his punishment until your verdict has been returned and further evidence is heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt that the killing was malicious but that the Commonwealth has proved beyond a reasonable doubt that the defendant killed Stacie Reed and further:

1. That the killing was the result of an intentional act; and

2. That the killing was committed while in the sudden heat of passion upon reasonable provocation;

Then you shall find the defendant guilty of voluntary manslaughter but you shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any of the above offenses, then you shall find the defendant not guilty.

Appendix K

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from

reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings,

the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

Va. Code Ann. § 18.2-31. Capital murder defined; punishment

The following offenses shall constitute capital murder, punishable as a Class 1 felony:

1. The willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit or with the in-tent to defile the victim of such abduction;

2. The willful, deliberate, and premeditated killing of any person by another for hire;

3. The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;

4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery;

5. The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration;

6. The willful, deliberate, and premeditated killing of a law-enforcement officer as defined in § 9.1-101 or any law-enforcement officer of another state or the United States having the power to arrest for a felony under the laws of such state or the United States,

when such killing is for the purpose of interfering with the performance of his official duties;

7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction;

8. The willful, deliberate, and premeditated killing of more than one person within a three-year period;

9. The willful, deliberate, and premeditated killing of any person in the commission of or attempted commission of a violation of § 18.2-248, involving a Schedule I or II controlled substance, when such killing is for the purpose of furthering the commission or attempted commission of such violation;

10. The willful, deliberate, and premeditated killing of any person by another pursuant to the direction or order of one who is engaged in a continuing criminal enterprise as defined in subsection I of § 18.2-248;

11. The willful, deliberate, and premeditated killing of a pregnant woman by one who knows that the woman is pregnant and has the intent to cause the involuntary termination of the woman's pregnancy without a live birth;

12. The willful, deliberate, and premeditated killing of a person under the age of fourteen by a person age twenty-one or older;

13. The willful, deliberate, and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism as defined in § 18.2-46.4;

14. The willful, deliberate, and premeditated killing of a justice of the Supreme Court, a judge of the Court of Appeals, a judge of a circuit court or district court, a retired judge sitting by designation or under temporary recall, or a substitute judge appointed under § 16.1-69.9:1 when the killing is for the purpose of interfering with his official duties as a judge; and

15. The willful, deliberate, and premeditated killing of any witness in a criminal case after a subpoena has been is sued for such witness by the court, the clerk, or an attorney, when the killing is for the purpose of interfering with the person's duties in such case.

If any one or more subsections, sentences, or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair, or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid.

Va. Code Ann. § 19.2-264.3. Procedure for trial by jury

A. In any case in which the offense may be punishable by death which is tried before a jury the court shall first submit to the jury the issue of guilt or innocence of the defendant of the offense charged in the indictment, or any other offense supported by the evidence for which a lesser punishment is provided by law and the penalties therefor.

B. If the jury finds the defendant guilty of an offense for which the death penalty may not be imposed, it shall fix the punishment as provided in § 19.2-295.1.

C. If the jury finds the defendant guilty of an offense which may be punishable by death, then a separate proceeding before the same jury shall be held as soon as is practicable on the issue of the penalty, which shall be fixed as is pro-vided in § 19.2-264.4.

If the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty.

133

(2)

No. 09-21

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

PAUL WARNER POWELL,

Petitioner,

v.

LORETTA K. KELLY, WARDEN,
Sussex I State Prison,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

1. Is there a compelling reason to review the federal habeas court's judgment upholding the state court's decision – which this Court already rejected as grounds for review on direct appeal – that denied a double jeopardy claim because the intent of the state legislature is that separate capital murder offenses are committed whenever there are separate victims of the gradation offenses?

2. Should this Court consider granting a stay of execution, or certiorari review, on Powell's assertion that his double jeopardy and ineffective assistance of counsel claims both involve the issue in the grant of certiorari in *Wood v. Allen* (involving a federal court's analysis of state-court fact-finding), despite the fact that Powell's case only involved state law determinations and no facts were at issue?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF THE CASE 2

I. The First Trial and Appeal 2

II. The Second Trial and Appeal 10

III. The State Habeas Corpus Case 15

IV. The Federal Habeas Corpus Case 16

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY SHOULD BE DENIED 17

I. Powell never has presented his first argument to any court and, in any event, it fails to merit further review 17

II. Powell's bill of particulars argument addresses no federal issue 20

III. The certiorari questions at issue in *Wood v. Allen* are not at issue here 25

CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Barefoot v. Estelle, 463 U.S. 880 (1983) 32

Blockburger v. United States, 284 U.S. 299 (1932) 22, 23

Brown v. Ohio, 432 U.S. 161 (1977) 24

Bullington v. Missouri, 451 U.S. 430 (1981) 17, 19, 20

Clark v. Arizona, 548 U.S. 735 (2006) 18

Harward v. Commonwealth, 330 S.E.2d 89 (Va. 1985) 9

Illinois v. Gates, 462 U.S. 213 (1983) 18

Kentucky v. Stincer, 482 U.S. 730 (1987) 18

Livingston v. Commonwealth, 36 S.E.2d 561 (Va. 1946) 13, 21

Payne v. Commonwealth, 509 S.E.2d 293 (Va. 1999) 9, 21

Powell v. Commonwealth, 552 S.E.2d 344 (Va. 2001) 6, 8, 9, 14, 18

Powell v. Commonwealth, 590 S.E.2d 537 (Va. 2004) 14, 15, 21, 24

Powell v. Kelly, 531 F. Supp.2d 695 (E.D. Va. 2008) 16, 24

Powell v. Kelly, 551 U.S. 1118 (2007) 16

Powell v. Kelly, 562 F.3d 656 (4th Cir. 2009) 16, 24, 27, 28, 29

Powell v. Virginia, 543 U.S. 892 (2004) 15

TABLE OF AUTHORITIES – Continued

Page

Powell v. Warden, 634 S.E.2d 289 (Va. 2006).....16, 29, 30, 31

Ring v. Arizona, 536 U.S. 584 (2002).....19

Sanabria v. United States, 437 U.S. 54 (1978)....23, 24

Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) 17

Schriro v. Landrigan, 550 U.S. 465 (2007).....27

Strickland v. Washington, 466 U.S. 688 (1984).....16, 29

United States v. Dixon, 509 U.S. 688 (1993).....23

Wiggins v. Smith, 539 U.S. 510 (2003).....26

Wood v. Allen, 129 S.Ct. 2389 (2009) 25, 31

Williams v. Taylor, 529 U.S. 362 (2000).....27

STATUTES AND RULES

Federal Statutes:

28 U.S.C.:

§ 2254.....16, 27

§ 2254(d) 16, 27, 31

§ 2254(d)(2).....25, 26, 28

§ 2254(e) 27, 31

§ 2254(e)(1).....26, 28, 31

Code of Virginia

§ 18.2-26 6

§ 18.2-31(1-15).....6, 18

TABLE OF AUTHORITIES – Continued

Page

§ 18.2-31(4) 6

§ 18.2-31(5) 7

§ 18.2-61 6

§ 19.2-264.4 13

§ 53.1-232.1 ..... 16, 17

U.S. Sup. Ct. R. 10 18

INTRODUCTION

No court ever has granted relief to Paul Powell on his currently-claimed allegations of double jeopardy and ineffective assistance of counsel. Powell now fully admits his guilt and says his crimes of murder, attempted rape, rape, and attempted murder were "atrocious." However, he omits those "atrocious" facts, including his own expert's evaluation of him which described a severe psychopathy. Those "atrocious" facts were crucially integral to the lower courts' finding, on his claim of ineffective assistance, that Powell was not prejudiced by his trial counsel's failure during the sentencing phase to object to one inaccurate entry on a criminal records form.

Powell's certiorari petition misrepresents the legal holdings of the state supreme court and federal habeas courts, all of which rejected his claims. On his double jeopardy claim, he ignores the settled state law which defined the very acts he personally boasted he had committed as separate offenses perpetrated against two different victims. On his ineffective assistance claim, he repeatedly mistakenly implies that the Commonwealth purposefully presented his sentencing jury with false evidence when there never has been one shred of evidence to support such an implication. He misstates that the criminal record form contained numerous errors when, in fact, there only ever has been one error identified by Powell. And he ignores the holdings of all the lower courts which found that the one error was non-prejudicial because the role the form played in the sentencing proceeding

was virtually non-existent, the error could not have affected the jury's separate finding of vileness to support the death sentence, and the error would not have changed one juror's vote when the whole record, which proved Powell's future dangerousness by overwhelming evidence, is considered.

Finally, Powell attempts to stop his execution by misrepresenting that his case, and the judgment of the Fourth Circuit, are similar to another case upon which this Court has granted certiorari. This Court should not be misled by Powell's exaggeration and mischaracterization of the facts and law involved in his case.

STATEMENT OF THE CASE

I. The First Trial and Appeal

As found by the Virginia Supreme Court, the facts of Powell's brutal crimes are as follows:

> Powell was acquainted with Stacie Lynn Reed (Stacie) for two and a half years prior to the commission of the crimes in question. Kristie Erin Reed (Kristie), Stacie's younger sister, described her sister and Powell as "[f]riends." Powell, who was 20 years old at the time of the murder, had wanted to date Stacie, who was 16 years old, but recognized that she was underage and he "could go to jail for that."

Powell, a self-avowed "racist and white supremacist," was aware that Stacie, who was white, was dating Sean Wilkerson, who is black. Wilkerson had recently moved to another locality, but he and Stacie remained in contact. Stacie was a member of her high school's Junior Reserve Officer's Training Corps and planned to attend a military ball with Wilkerson.

Just before noon on January 29, 1999, Stacie arrived home from school early, having completed her examinations that were being given that day. Powell was waiting for her at her home when she arrived. When Powell learned that Robert Culver, a friend of the girls' mother, would be home shortly for lunch, Powell left and returned at about 12:45 p.m., after Culver had left. When Powell returned, he was armed with a "survival" knife, a "butterfly" knife, a box cutter, and a 9-millimeter pistol.

Stacie was talking to Wilkerson on the telephone. After Stacie ended the telephone conversation, Powell confronted her about her relationship with Wilkerson. He demanded that Stacie end her relationship with Wilkerson. According to Powell, he and Stacie argued, and the argument grew into a struggle. Powell drew the survival knife from his belt and Stacie "got stuck." Powell denied stabbing Stacie deliberately. The struggle continued briefly until Stacie collapsed on the floor in her sister's bedroom.

Although Powell did not know whether Stacie was still alive, he made no effort to determine her condition or call for medical assistance. Powell "wandered around the house, got some iced tea, had a cigarette." Kristie arrived home from school shortly after 3 p.m. and was met at the door of the home by Powell. Powell told her that Stacie was in her room, but moments later Kristie discovered her sister's body in Kristie's bedroom. She dropped her schoolbooks and began to cry.

Powell ordered Kristie to go to the basement. Kristie, who knew that Powell was usually armed, complied because she "didn't want to die." In the basement, Powell ordered Kristie to remove her clothes and to lie on the floor. Powell then raped Kristie, and she "begg[ed] him not to kill her." Powell later admitted that he knew that Kristie, who was 14 years old at the time of the rape, had been a virgin.

While Powell and Kristie were in the basement, Mark Lewis, a friend of Kristie, came to the house and knocked on the door. When Powell heard the knock, he tied Kristie's legs together and tied her hands behind her back with shoelaces he cut from her athletic shoes. Powell then dressed and went upstairs.

While Powell was upstairs, Kristie managed to loosen the bonds on her hands and attempted to "scoot across the floor to hide" under the basement steps. Hearing Powell

coming back to the basement, she returned to the position on the floor where he had left her. Powell then strangled Kristie with a shoelace and she lost consciousness. While she was unconscious, Powell stabbed Kristie in the abdomen and slit her wrists and throat.

Powell returned upstairs, searching for "anything worth taking." He fixed another glass of iced tea, which he took with him when he left the home a short time later. Powell went to a friend's house and then drove with the friend to the District of Columbia to buy crack cocaine.

Kristie regained consciousness sometime after Powell had left her home. About 4:10 p.m., she heard Culver return home, and she called out his name. Culver discovered Kristie in the basement, called the 911 emergency response telephone number, and began rendering first aid to her. . . .

An autopsy revealed that Stacie had died from a knife wound to the heart. The medical examiner testified that there was a single entrance wound and two exit wounds indicating that the knife had been withdrawn, at least partially, and then reinserted into the heart. . . .

Stacie's body also exhibited a number of bruises on the head, chest, abdomen, back, arms, and legs, abrasions on the face, a stab wound to the back, and a cut and scrapes on the left forearm. The autopsy further

> revealed that Stacie had been struck on the head with sufficient force to cause bleeding inside her scalp and in the membranes surrounding her brain prior to death. . . .
>
> While in jail, Powell wrote letters to friends in which he admitted having committed the murder, rape, and attempted murder because of Stacie's relationship with a black man. He further claimed that he had planned to kill Stacie's family and steal the family's truck. Powell also wrote to a female friend and asked her to "get one of [her] guy friends . . . to go to a pay phone and call Kristie and tell her [that] she better tell the cops she lied to them and tell her [that] she better not testify against me or she's gonna die."

Powell v. Commonwealth, 552 S.E.2d 344, 347-48 (Va. 2001). A grand jury in Prince William County, Virginia indicted Powell in 1999 for his capital murder of Stacie in the commission of robbery or attempted robbery (Va. Code § 18.2-31(4))[1], and for his rape (Va. Code § 18.2-61) and attempted murder (Va. Code § 18.2-26) of Kristie.

The trial court granted the Commonwealth's request to amend the indictment to add the charge of capital murder during the commission of rape or

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[1] In Virginia, capital murder is defined as a premeditated murder coupled with a specifically defined additional circumstance, or gradation offense, such as robbery or rape. Va. Code § 18.2-31(1-15).

attempted rape. Va. Code § 18.2-31(5).[2] The court denied Powell's objection to the amendment, but granted him a bill of particulars from the Commonwealth to name the victim of the rape/attempted rape. The prosecutor represented in the bill of particulars that that victim was Kristie. (JA 22).[3]

At the close of the evidence, the court instructed the jury that it could find capital murder if the Commonwealth proved beyond a reasonable doubt a premeditated murder in the commission of robbery or attempted robbery, and/or an additional capital murder if the Commonwealth proved beyond a reasonable doubt a premeditated murder during the commission of rape. (JA 59). There was no "attempted rape" or "attempted rape of Stacie" option on the capital murder instructions. The court also instructed the jury that it was "immaterial that the victim of the murder and the victim of the rape are two different people." (JA 63). On the instruction for the crime of rape, the court instructed that the victim was Kristie. (JA 64).

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[2] The amendment also included other language from § 18.2-31(5) charging the "commission of sodomy or attempted sodomy," but no evidence of sodomy was presented and the jury was not so instructed. There is no issue now regarding that language.

[3] References to the joint appendix filed below in the Fourth Circuit are denoted herein as "(JA __)." A copy of the joint appendix has been lodged with this Court.

During their guilt-phase deliberation, the jury asked the court whether the rape of Kristie satisfied the capital murder/rape charge. (JA 62). The court told the jury it did. (JA 62).

The capital murder sentencing verdict form specified that the jury found Powell guilty of capital murder in the commission of rape. (JA 78). The jury did not return a verdict of guilty on the capital murder/robbery charge. The court polled the jury on its verdict. Each juror verbally stated that rape, not attempted rape, was the predicate offense for the capital murder conviction. (JA 70-72). The jury also convicted Powell of the rape and attempted murder of Kristie. In a separate sentencing proceeding, the jury sentenced Powell to death for capital murder and to life terms for the other crimes.

In his 2001 direct appeal, Powell challenged the amendment of the indictment, specifically arguing that the amendment had charged Kristie as the alleged victim of the rape: "In the case now before this Court for review, the victim of the homicide and the alleged robbery was one person, Stacie Reed, while the victim of the alleged rape and sodomy was another person, Kristie Reed." (JA 923).

The Supreme Court of Virginia reversed the capital conviction. *Powell v. Commonwealth*, 552 S.E.2d 344 (Va. 2001). Two errors occurred. First, the trial court should not have allowed the amendment because the General Assembly intended that each enumerated capital crime be a separate offense, *see*

Payne v. Commonwealth, 509 S.E.2d 293, 301 (Va. 1999), and the Commonwealth could not add a new offense which had not been found first by the grand jury. Only minor defects or variances in indictments are permitted to be corrected by amendment. *Powell*, 552 S.E.2d at 356-57.

Second, the Commonwealth mis-worded its amended indictment to include the language "during" the commission of rape, instead of "in" the commission of rape. The former is restricted to crimes of murder occurring during or after the rape; the latter permits crimes of murder occurring before, during, or after a rape. *See Harward v. Commonwealth*, 330 S.E.2d 89, 91 (Va. 1985).[4] Because it was uncontested that Powell murdered Stacie before he raped Kristie, the murder could not have occurred "during" the commission of rape. The court remanded for re-trial on first-degree murder due to the amendment error, and because there was no evidence even to support the amended indictment. *Powell*, 552 S.E.2d at 356-57, 363.

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[4] After *Harward*, the General Assembly amended the statute to permit the more expansive crime of murder "in" the commission of rape, however, the Commonwealth in *Powell* mistakenly used the older, more restrictive, language discussed in *Harward*.

II. The Second Trial and Appeal

After remand, Powell wrote the prosecutor an obscene letter boasting that, because he could not be re-tried for capital murder, he would tell "the rest of what happened." (JA 141). He described in detail how, when Stacie refused to have sex with him, he attempted to rape her, and how, when she fought him, he stabbed her in her abdomen, and then stomped repeatedly on her throat until she was dead. (JA 141-44). The prosecutor nolle prossed the remanded first degree murder charge, and obtained a new indictment for capital murder on December 3, 2001, of Powell's capital murder of Stacie during the commission of his attempted rape of Stacie. (JA 108).

Before trial, Powell filed motions seeking to dismiss the capital murder indictment on double jeopardy grounds. The trial court found that the new indictment charged a different offense than had been tried in the first trial: neither the original 1999 indictment, nor the amended indictment, charged the capital murder of Stacie based on the rape or attempted rape of Stacie and the bill of particulars specified that Kristie was the only victim of the predicate offense of rape in the first trial. (JA 123, 139-40). The jury convicted Powell as charged.

In the separate sentencing phase, the prosecutor relied on the shocking evidence of the crimes themselves, and also presented evidence of Powell's self-professed racial hatred and desire to continue to kill through letters, drawings, and other admissions.

(JA 174-75). He killed Stacie because she was a "nigger-lovin slut," and he wanted to kill all black people. (Tr. 1/15/03 at 52-63). The jury received an offensive letter Powell had written to Stacie's mother after the murder that mocked her dead daughter with a photograph of a partially nude woman. (JA 168-69). They learned that Powell had tried to threaten Kristie's life if she testified against him. (Tr. 1/15/03 at 1217). They learned that Powell had tortured animals by blowing them up with firecrackers. (JA 189). They heard the heart-wrenching "911" call made when Robert Culver discovered the girls. (Tr. 1/14/03 at 39). They listened to the testimonies of Mr. Culver, Mrs. Reed and Kristie, learned how Kristie miraculously survived, but suffered horrific physical and mental trauma for many months, and viewed the terrible scars Kristie bears for the rest of her life across her throat. (Tr. 1/14/03 at 641-712).

They learned that Powell admitted he also would have shot and killed Mr. Culver if he had found Powell still there (Tr. 1/14/03 at 171), and Powell's view that the judge and jury "don't mean shit to me." (*Id.* at 172-73). They heard how the murder and rape tore the Reed family apart, resulting in their abandoning the house where it happened (their "dream home"), in Mrs. Reed being unable to leave Kristie alone, and ultimately leading Mrs. Reed and Mr. Culver, who had married shortly after the crimes, into divorce. (Tr. 1/15/03 at 76).

The jury also heard from Powell's own witnesses that he had been in and out of juvenile detention and

psychiatric hospitals since about the age of 11. (JA 277). Powell's psychologist told the jury that Powell was aggressive, defiant, impulsive, egocentric, opportunistic, exploitative, exhibited violent outbursts and had extreme "reactive anger." (JA 271-87).

The prosecutor submitted to the jury, without objection, the national criminal information form provided by the FBI which contained Powell's prior criminal record (the NCIC form). (JA 183, 606). The prosecutor stated orally, and accurately, to the jury that Powell had been convicted of the abduction, rape and attempted murder of Kristie as well as prior convictions for larceny and contributing to the delinquency of a minor. (JA 183). The NCIC form was not mentioned at trial other than to admit it into evidence.

The form accurately contained one entry for capital murder which was the conviction that had been reversed on appeal. (JA 606). The jury knew about that conviction and reversal, both from Powell's own letter to the prosecutor (JA 141-44), and from his trial counsel who informed the jury about the prior conviction and reversal. (JA 166-67). The form contained a second accurate entry for capital murder which was listed as a pending charge and which was the case before the jury for decision. (JA 607). The form also contained a third entry for capital murder which was inaccurate. That entry mistakenly listed

"capital murder" for Powell's "attempted capital murder" of Kristie. (JA 606).[5]

The jury found that Powell would commit violent acts that would constitute a continuing serious threat to society, and that his crimes were vile in that they constituted depravity of mind and aggravated battery. *See* Va. Code § 19.2-264.4.

On direct appeal, Powell argued that (1) the Virginia Supreme Court's opinion in the first appeal mandated that he not be tried for capital murder, (2) the "law of the case" precluded another trial for capital murder, and (3) double jeopardy barred the second prosecution. The Virginia Supreme Court unanimously rejected these arguments after thoroughly discussing them. It specifically held as a matter of state law:

> As noted above, while "it is true the bill of particulars is not for the purpose of charging the offense . . . the bill of particulars and the indictment must be read together." *Livingston, 184 Va. at 837, 36 S.E.2d at 565.*

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[5] There were no other entries on the NCIC form for Powell's attempted capital murder. Also, the inaccurate entry listed "felonious assault" as the original charge, the same original charge listed on the Virginia State Police disposition form associated with Powell's attempted capital murder of Kristie. (JA 568). And, in addition to the same arrest and charging dates associated with the attempted capital murder, it also listed the same sentencing hearing date and code section for assault found on the charging papers associated with the attempted capital murder. (JA 563-69).

> Thus, we hold that where, prior to the attachment of jeopardy, the Commonwealth limits the prosecution of a capital murder, undifferentiated in the indictment by the identity of the victim of the gradation offense, by naming a specific victim of the gradation offense in a bill of particulars, jeopardy will attach only to the capital murder charge as made specific by the bill of particulars.

Powell v. Commonwealth, 590 S.E.2d 537, 554 (Va. 2004). It also held that the prosecutor's comments in the first trial about Powell wanting to have sex with Stacie could not support a theory that the jury actually acquitted him of the attempted rape of Stacie because, as a matter of state law, the jury was not making any determination of a charge of attempted rape of Stacie. *Id.* at 550-52.

It clarified that, in the first appeal, it never had held that the evidence was insufficient to find that Powell had attempted to rape Stacie. Rather, its comments in its conclusion, *Powell*, 552 S.E.2d at 363 ("that there is simply no evidence upon which the jury could have relied to find that Powell committed or attempted to commit any sexual assault against Stacey [sic] before or during her murder, or that the rape of Kristie did not occur after the murder of her sister") were "made to clarify that the amended indictment must have been intended to charge Powell with the capital murder of Stacey [sic] premised upon the gradation offense of the rape of Kristie, but was

insufficient to do so because of a drafting error." 590 S.E.2d at 552.

Powell's subsequent petition for a writ of certiorari in this Court was based solely on his double jeopardy claim. This Court denied his petition on October 4, 2004. *Powell v. Virginia*, 543 U.S. 892 (2004).

III. The State Habeas Corpus Case

In his state habeas petition filed in the Virginia Supreme Court, Powell argued that he had been tried twice for the same offense, the Commonwealth was collaterally estopped from prosecuting him again for capital murder, and his trial counsel were ineffective because they did not object to the NCIC form at sentencing which he alleged contained numerous errors, including two capital murder entries. The Virginia Supreme Court unanimously rejected Powell's habeas claims in its unpublished November 8, 2005, decision. (JA 517).

The court subsequently granted Powell's petition for rehearing on his argument that his trial counsel were ineffective for failing to object to a third capital murder entry on the NCIC form, specifically the inaccurate capital murder entry described above. After full briefing and oral argument on the issue, the Virginia Supreme Court dismissed the claim in a published opinion finding no prejudice under

Strickland v. Washington, 466 U.S. 668 (1984). *Powell v. Warden*, 634 S.E.2d 289 (Va. 2006).[6] The court denied Powell's subsequent, second petition for rehearing on January 5, 2007. (JA 634).[7] As required by Virginia Code § 53.1-232.1, on January 17, 2007, the Prince William County Circuit Court set Powell's execution date for February 15, 2007.

IV. The Federal Habeas Corpus Case

On January 25, 2007, the United States District Court stayed the execution. On July 6, 2007, Powell filed a habeas petition under 28 U.S.C. § 2254 in the district court alleging his double jeopardy and ineffective assistance claims. On January 11, 2008, the district court dismissed the claims, finding that the state court's adjudication was not unreasonable under § 2254(d). *Powell v. Kelly*, 531 F. Supp.2d 695 (E.D. Va. 2008).

On April 15, 2009, after full briefing and argument, the United States Court of Appeals for the Fourth Circuit affirmed the dismissal in a lengthy opinion. *Powell v. Kelly*, 562 F.3d 656 (4th Cir. 2009). The Fourth Circuit denied Powell's petition for

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[6] A majority of the court found that the dissenting opinion failed to take into consideration the totality of the evidence to be weighed in determining the issue of prejudice, as required by this Court in *Strickland*. *Powell*, 634 S.E.2d at 297, n.*.

[7] On June 11, 2007, this Court denied Powell's second petition for a writ of certiorari. *Powell v. Kelly*, 551 U.S. 1118 (2007).

rehearing on May 12, 2009, with no judge requesting a poll on Powell's request for rehearing *en banc*.

On May 19, 2009, pursuant to Virginia Code § 53.1-232.1, the Circuit Court of Prince William County scheduled Powell's execution for July 14, 2009. On July 2, 2009, the Fourth Circuit denied Powell's motion for a stay of execution. This Court docketed Powell's petition for a writ of certiorari on July 6, 2009.

REASONS WHY THE PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR STAY SHOULD BE DENIED

I. Powell never has presented his first argument to any court and, in any event, it fails to merit further review.

Powell argues that he was put into jeopardy *of his death sentence* in his first trial and that he was *acquitted of death* in that proceeding. He relies upon this Court's line of cases starting with *Bullington v. Missouri*, 451 U.S. 430 (1981), dealing with the issue of "whether a first life sentence was an 'acquittal' based on findings sufficient to establish legal entitlement to the life sentence – *i.e.*, findings that the government failed to prove one or more aggravating circumstances beyond a reasonable doubt." *Sattazahn v. Pennsylvania*, 537 U.S. 101, 108 (2003). However, Powell never presented this argument in the court below as grounds for reversal and the

Fourth Circuit, whose judgment is before this Court for review, never addressed it. Where a petitioner's claim was "neither pressed nor passed upon" in the lower court, this Court consistently has held that it will not consider it. *See Clark v. Arizona,* 548 U.S. 735, 765 (2006), *citing Kentucky v. Stincer,* 482 U.S. 730, 747, n.22 (1987), *and Illinois v. Gates,* 462 U.S. 213, 217-24 (1983). Powell thus fails to demonstrate the necessary compelling reason for review. *See* U.S. Sup. Ct. Rule 10.

In any event, the issue is simply not presented in Powell's case. Powell never was "acquitted of death." His claim deals instead with the issue of double jeopardy in the traditional sense: was he tried twice for the same crime? It involves no prior finding of entitlement to a *life sentence*, or any other sentencing issue. Indeed, the first jury sentenced him to *death* and found the necessary sentencing-phase, statutory aggravating circumstance to support the death sentence. *Powell*, 552 S.E.2d at 354. The validity of Powell's death sentence, or the sufficiency of the evidence supporting the jury's finding of an aggravating factor, never has been at issue in his case.

What Powell seems to try to argue, for the first time, is that Virginia's capital murder elements set out in Virginia Code § 18.2-31(1-15) (premeditation plus another statutorily-defined circumstance, or gradation offense, like rape), are like sentencing-phase aggravators in other States' capital murder statutes, and therefore *actually are* sentencing factors. Therefore, his argument goes, if he has been

put in jeopardy for any of those elements once, he may not be put in jeopardy of them again under *Bullington*. The problems with this theory are many.

First, there is no authority cited by Powell, and certainly none from this Court, to support his theory. Second, *Bullington* only applies where there has been a life sentence imposed for murder; Powell never has been sentenced to life.

Third, the elements of a crime, and the sentencing-phase aggravators necessary to a death sentence, are distinct matters proving different things. Whether the defendant committed a crime, and whether he is deserving of a particular sentence, are separate inquiries determined at separate phases or "trials." Virginia's capital murder elements are not sentencing phase elements or factors. They are elements required by statute to prove guilt of the crime, not the sentence.

Fourth, Powell's citation to *Ring v. Arizona*, 536 U.S. 584 (2002), for the proposition that what you call an aggravator is irrelevant, misunderstands what was at issue in *Ring*. *Ring* did not address the Fifth Amendment prohibition against double jeopardy at trial or sentencing. *Ring* was a Sixth Amendment case addressing only the right to a jury determination of sentencing phase facts which are necessary to consideration of a death sentence, and Virginia has required jury-sentencing since Colonial times.

Fifth, Powell was acquitted in his first trial of capital murder in the commission of robbery when the jury failed to return that verdict. He never again may be tried for that crime. He was acquitted in his first appeal when the Virginia Supreme Court found, as a matter of law, that capital murder cannot be committed during the commission of a rape committed after the murder. He never again may be tried for capital murder during the commission of his rape of Kristie.

But Powell never was acquitted, at trial or on appeal, of a death sentence. No jury or court ever has found that the Commonwealth failed to prove the sentencing-phase, aggravating factors necessary to obtain a death sentence, or even that those factors otherwise were found in error. Powell is simply wrong in his assertion that the Virginia Supreme Court's discussion of the *capital murder* elements somehow was a discussion of "death-qualifying elements."

Powell's attempt to put a square peg into a round hole with his confusing *Bullington* argument is simply inapposite to his case. It certainly does not merit review by this Court.

II. Powell's bill of particulars argument addresses no federal issue.

In his second argument, Powell takes issue, as he did below, with the Virginia Supreme Court's application of its settled law that a bill of particulars, and particularly one like Powell's which expressly

was sought by the defendant for his benefit, must be read together with the indictment to determine for what offenses the defendant has been tried. *See Powell*, 590 S.E.2d at 554, *citing Livingston v. Commonwealth*, 36 S.E.2d 561, 565 (Va. 1946). Powell's argument is over how Virginia defines her offenses, not over any federal law. It thus fails to present this Court with any federal issue to decide.

Indeed, Powell's whole argument is dependent upon having this Court ignore the bill of particulars which, the Virginia Supreme Court determined, identified in this particular case, along with the indictment, the offense for which Powell was first tried and acquitted: (1) premeditated murder; (2) committed during or after; (3) his rape of Kristie. He does not quibble with the fact that the Virginia legislature intended in its capital murder statute to define separate offenses for (1) each gradation of capital murder, and (2) for each separate victim of each gradation offense. *See Powell*, 590 S.E.2d at 553-54, *citing Payne*, 509 S.E.2d at 301. He does not quibble with the fact that, in his second trial, the Commonwealth tried him for (1) premeditated murder (2) committed during or after (3) his attempted rape of Stacie. In fact, the indictment contained that very language. His entire argument is that anything outside the indictment should not have been considered. But that is an argument with the Virginia Supreme Court which he lost; it is not an argument about federal constitutional law.

Powell never has cited a single case holding that a State may not define its offenses by looking at the indictment and bill of particulars together. Certainly, with Powell expressly having asked the Commonwealth in his first trial to limit herself to one particular offense, no constitutional provisions prohibited the Commonwealth from holding Powell to his original request that he be tried only for that offense. His decision to limit the Commonwealth in his first trial to a crime he knew he had not committed, and, at the same time, to keep only to himself the knowledge that he had committed the different offense of murder during the commission of his attempt to rape Stacie, was no fault of the Commonwealth. The Commonwealth was ready, willing, and able to try him for any and all crimes for which there was evidence to prosecute.

Powell's argument always has been dependent upon re-writing Virginia law to do away with its provision for identifying offenses by considering both the bill of particulars and indictment together. Only then could he construct his argument that the elements of his crimes were the same under *Blockburger v. United States*, 284 U.S. 299 (1932). But *Blockburger* did not dictate how crimes are defined; it involved this Court defining an offense under a federal statute. Indeed, Blockburger argued that his crimes were the same because they involved sales to the same person, *id.* at 301, not unlike Powell's argument. It was the prerogative of this Court to determine that Congress meant the offenses

to be different because they involved separate sales at separate times. *Id.* Likewise, it was the prerogative of the Virginia Supreme Court to determine that the Virginia General Assembly meant for there to be different offenses when the murderer raped or attempted to rape two different gradation victims. It simply involves no federal issue.

Powell argues that the "facts" do not matter, and only the "elements" matter under *United States v. Dixon*, 509 U.S. 688 (1993). However, what Powell fails to understand is that *Dixon*, another federal statute case, was not addressing how a State defines an offense, or even how the federal court makes that determination. *Dixon* addressed the "same conduct" test the Court had created just three terms prior and now was overruling. *Id.* at 704. It simply reaffirmed the *Blockburger* test as the standard for assessing double jeopardy claims involving an offense which violates two or more statutes. *See Dixon*, 509 U.S. at 695 (criminal contempt based on a violation of a criminal law incorporated into a court order bars a subsequent prosecution for the criminal offense because the elements of one are the elements of the other and thus the defendant already has been tried for the offense in the contempt proceeding). But Powell's *offenses* were different because they were committed against two different persons: he attempted to rape Stacie and he raped Kristie.

In Powell's case, both the district court and Fourth Circuit believed that *Sanabria v. United States*, 437 U.S. 54 (1978), governed the issue and

that the state court, while not citing *Sanabria*, followed that precedent reasonably by determining legislative intent. *Powell*, 531 F. Supp.2d at 707-09; *Powell*, 562 F.3d at 665-66. Certainly, the state court in Powell's case used the same analysis that *Sanabria* used. In *Sanabria*, the Court held, with regard to a federal statute, that "[f]ew, if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define offenses. *Brown v. Ohio*, 432 U.S. 161, 165 (1977)." 437 U.S. at 69. It further held that "[w]hether a particular course of conduct involves one or more distinct 'offenses' under the statute depends on this congressional choice." *Id.* at 70. Clearly, the Virginia Supreme Court determined that its legislature intended that separate capital offenses are committed when the murderer commits the gradation offenses against separate victims. *Powell*, 590 S.E.2d at 554. Because that holding was not an unreasonable application of this Court's precedent, the Fourth Circuit cannot have erred in affirming the district court's same assessment. Its straightforward analysis on a settled area of the law presents nothing compelling to review.

Powell goes astray when he speaks of the Virginia statutory framework as "multiple theories" of capital murder. It is not. Instead, its capital murder statute defines fifteen distinct offenses and, under state supreme court interpretation, each gradation offense committed against a separate victim is a separate capital murder offense.

Powell's argument that there is a conflict of opinion on this in the state courts is a make-weight argument. He cites a Maine and Louisiana case for the proposition that any charged offense which was within the scope of a previous charge is barred. But no one argues with that general principle. Powell's charge of murder/attempted rape of Stacie simply was not within the scope of the prior charge of his murder/rape of Kristie. They were two different offenses as determined unanimously by the Virginia Supreme Court and citizens of the Commonwealth through its elected General Assembly. There is no legal issue in conflict and nothing compelling about Powell's double jeopardy claim.

III. The certiorari questions at issue in *Wood v. Allen* are not at issue here.

Powell argues that this Court should grant certiorari, or hold his case, until this Court decides *Wood v. Allen*, 129 S.Ct. 2389 (2009) (granting certiorari on questions 1 and 2). However, the questions upon which this Court granted certiorari simply are not at issue in Powell's case. Question 1 asks whether a state court's decision was based on an unreasonable determination of facts under 28 U.S.C. § 2254(d)(2) when it concluded that the failure of a novice attorney, during the sentencing phase, to investigate or present evidence of the defendant's severely impaired mental functioning was a strategic decision even though the record shows otherwise.

(Pet. Cert. No. 08-9156). Obviously, Powell's case presents no such issue. Powell has presented this Court with no issue under *Wiggins v. Smith*, 539 U.S. 510 (2003), about investigation of mitigating evidence. There is no issue in Powell's case about state-court fact-finding, much less about fact-finding that is contradicted by the record.

Wood's Question 2 asks whether the federal court erred in according the presumption of correctness under 28 U.S.C. § 2254(e)(1) to facts which are supported by the state court record, instead of looking at the entire state court record to determine whether those facts reasonably were found under § 2254(d)(2). (Pet. Cert. No. 08-9156). Wood argues the federal court must determine the reasonableness of the fact-finding under § 2254(d)(2) based on the entire state court record before reaching any presumptions of correctness under § 2254(e)(1). (*Id.*). None of these concerns are at play in Powell's case.

Powell says that the Fourth Circuit applied § 2254(e)(1) in his case with respect to his ineffective assistance and double jeopardy claims. Powell misstates the record. Neither of Powell's claims involved contested facts.

His double jeopardy claim involved no contested facts or fact-finding: his indictments, bill of particulars, the record of his two trials, and the Virginia Supreme Court's first opinion on direct appeal, contained the facts which no one contested. The Fourth Circuit's opinion affirming the district

court's dismissal of the claim was a straightforward application of § 2254(d), not § 2254(e). The Fourth Circuit first stated, in general terms, the standard for any federal habeas court reviewing a § 2254 petition. *Powell*, 562 F.3d at 664. It simply quoted the statutory language of § 2254(d), and then recited the unchallenged holdings of this Court in *Williams v. Taylor*, 529 U.S. 362 (2000), and *Schriro v. Landrigan*, 550 U.S. 465 (2007), interpreting § 2254(d). 562 F.3d at 664.

At the conclusion of this recitation, the court set forth briefly the statutory language of § 2254(e)(1): "Finally, § 2254(e)(1) provides that a state court's factual decisions 'shall be presumed to be correct' and that the petitioner bears the burden of 'rebutting the presumption of correctness by clear and convincing evidence.' 28 U.S.C. § 2254(e)(1)." *Id.* The Fourth Circuit did not, as alleged by Powell, make any determination about how and when § 2254(e)(1) would apply in a case involving state-court fact-finding.

The Fourth Circuit then discussed Powell's claims. With respect to his double jeopardy claim, it recited what Powell's arguments were, and then set forth what the law is governing the issue of double jeopardy. 562 F.3d at 665. It then recited what the Supreme Court of Virginia had held with respect to Powell's claim that his two offenses were the same, reciting from the state court's published opinion: that the General Assembly intended that the capital murder statute define separate offenses; and that Powell's second trial was for a separate offense. *Id.*

The Fourth Circuit then stated its own holding. It held that the state court decision was not contrary to clearly established law from this Court or an unreasonable application of that law. *Id.* at 665-66. It did not discuss, or apply, the § 2254(e)(1) presumption of correctness.

The Fourth Circuit then addressed Powell's claim that, even if the offenses were different, he had been tried twice because the Commonwealth had presented evidence in his first trial that he wanted to have sex with Stacie. The Fourth Circuit again recited what the state court had held: the bill of particulars restricted liability in the first trial for any charge of attempting to rape Stacie and thus he was not tried twice for the same crime. 562 F.3d at 666. The Fourth Circuit explained the role of a bill of particulars in Virginia law, and also that, as a matter of federal law, jeopardy did not attach in Powell's first trial until after both the indictment and bill of particulars had been filed. *Id.* at 666 n. 5. It held that the state court's decision was not an unreasonable determination of the facts under § 2254(d)(2) because (1) the state court held as a matter of state law that Powell was not tried for attempted rape of Stacie in his first trial, and (2) evidence that he wanted to have sex with Stacie does not demonstrate attempted rape. *Id.* at 666. The Fourth Circuit did not discuss, or apply, the § 2254(e)(1) presumption of correctness.

With respect to Powell's ineffective assistance claim, the Fourth Circuit first recited the entries on

the NCIC form, including the uncontested error. 562 F.3d at 667-68. It then recited the governing standard in *Strickland v. Washington*, 446 U.S. 668 (1984). *Id.* at 668. It recited the holding of the Virginia Supreme Court on the claim from its published opinion: Powell failed to demonstrate the requisite prejudice. *Id.* In fact, the Virginia Supreme Court's opinion on the matter was not based on any fact-finding. It accepted the uncontested fact that there was an inaccurate entry on the form for capital murder. *Powell*, 634 S.E.2d at 296. It based its finding of a lack of prejudice on the likewise uncontested and horrendous facts of the crime and Powell's conduct which were before the jury and which demonstrated beyond dispute that, if the NCIC form had not been admitted, it would have made no difference in the jury's verdict. *Id.* at 296-99.

Powell's complaint below and now that the Virginia Supreme Court failed to address the "erroneous" other two capital murder entries always has been groundless. The Virginia Supreme Court addressed Powell's complaints about the NCIC form in two opinions. The first was unpublished and addressed approximately seven allegations of error associated with the NCIC form. (JA 527-29). The second opinion, published, addressed the additional argument Powell made on rehearing regarding the inaccurate entry for felonious assault/capital murder. Powell never identified three erroneous capital murder entries. As discussed above, one entry was for his prior conviction which had been reversed on

appeal. It was not inaccurate. Another entry was for the capital murder charge which was listed as pending. That also was not inaccurate: it referred to the second trial which was being tried at the time. Only the third entry was inaccurate because it should have read "attempted capital murder" instead of "capital murder."

In the course of the Virginia Supreme Court's published opinion regarding the rehearing, the court noted that the inaccurate entry actually contained an arrest date, an offense date, and the location of the crime. From that information, all of which it is uncontested had been presented to the jury in evidence about the crimes, the court made the reasonable observation "that the erroneous entry on the NCIC form referred to Powell's attempted capital murder conviction concerning Kristie." *Powell*, 634 S.E.2d at 297. From that observation, Powell constructed in the federal courts an argument that the state court unreasonably found facts in the case.

But the Virginia Supreme Court did not base its determination of no prejudice on its observation that the NCIC entry contained information known by the jury to pertain to the ongoing capital trial; rather, it based its finding on the uncontested fact that little to no use was made of the form at trial, the uncontested fact that the inaccurate entry never was pointed out by anyone, the uncontested fact that the prosecutor accurately listed Powell's crimes orally to the jury, the uncontested facts of Powell's crimes proving his dangerousness, the uncontested facts of Powell's own

predictions that he would continue to kill, and the legal conclusion that, under Virginia law and the jury instructions, the NCIC form could not have affected the jury's finding of vileness to support the sentence. *Powell*, 634 S.E.2d at 297-99.

Powell now says that, because the Fourth Circuit in one short paragraph answered his argument – that the Virginia Supreme Court's observation about the dates and other information on the inaccurate entry was speculation – by noting that, under § 2254(e)(1), the facts are presumed correct unless Powell rebutted them with clear and convincing evidence, his case must be stayed for a decision in *Wood*. He is incorrect. *Wood* involves allegations that the federal court conflated §§ 2254(d) and (e). The Fourth Circuit's decision is bereft of any such conflation. It applies § 2254(d) to find the state court's decision reasonable, and handled Powell's complaint about the one state court factual observation – which was not the basis for the state court's finding of no prejudice – with a proper application of § 2254(e)(1) to that factual observation. It simply cannot be said that the Fourth Circuit's decision suffers from any of the conflation, or fact-finding issues, attendant to the Court's grant of certiorari in *Wood*.

Powell fails to demonstrate any compelling reason to grant review of his claims which were disposed of below by application of settled law, not contested facts. He thus fails to demonstrate under

Barefoot v. Estelle, 463 U.S. 880 (1983), any grounds to stay the scheduled execution of his sentence.

CONCLUSION

The petition for a writ of certiorari and application for a stay of execution should be denied.

Respectfully submitted,

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33

(2)

No. 09-21

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IN THE
Supreme Court of the United States

PAUL WARNER POWELL,
Petitioner,

v.

LORETTA K. KELLY,
WARDEN, SUSSEX I STATE PRISON,
Respondent.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

I. VIRGINIA CANNOT NEGATE THE DOUBLE JEOPARDY PRINCIPLES OF *BULLINGTON* AND *RUMSEY* BY CLASSIFYING A PREREQUISITE FOR DEATH AS AN "ELEMENT" OF CAPITAL MURDER. 2

II. A STATE CANNOT USE A BILL OF PARTICULARS TO DEFINE THE SCOPE OF JEOPARDY IN A MANNER INCONSISTENT WITH THE DOUBLE JEOPARDY CLAUSE. 5

III. THE ISSUE IN *WOOD* IS SQUARELY PRESENTED. 9

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

Arizona v. Rumsey, 467 U.S. 203 (1984) 2, 3

Brown v. Sanders, 546 U.S. 212 (2006) 5

Brown v. State, 521 So. 2d 110 (Fla. 1988) 4

Buchanan v. Angelone, 522 U.S. 269 (1998) 10

Bullington v. Missouri, 451 U.S. 430 (1981) 2, 3

Lenz v. Washington, 444 F.3d 295 (4th Cir. 2006) 12

Lowenfield v. Phelps, 484 U.S. 231 (1988) 5

Poland v. Arizona, 476 U.S. 147 (1986) 5

Ring v. Arizona, 536 U.S. 584 (2002) 4

State v. Caudill, 706 P.2d 456 (Idaho 1985) 4

State v. Lomax, 774 N.E.2d 249 (Ohio 2002) 4

Strickland v. Washington, 466 U.S. 668 (1984) 11

Tuilaepa v. California, 512 U.S. 967 (1994) 5

Weeks v. Angelone, 528 U.S. 225 (2000) 10

Yee v. City of Escondido, 503 U.S. 519 (1992) 3

Young v. Kemp, 760 F.2d 1097 (11th Cir. 1985) 3

STATUTES

28 U.S.C. § 2254 ..... 1, 12

INTRODUCTION

The Warden's opposition distorts the record and attempts to hide the substantial reasons why the petition should be granted and Powell's execution stayed.

The Warden argues that Powell was not in jeopardy at his first trial for capital murder in the commission of a rape or attempted rape of Stacie Reed even though, at that trial, the prosecutor *opposed* dismissal of the capital murder charge by arguing that "we have evidence here . . . that . . . [Powell] was having sex or attempting to have sex with Stacie" and the circumstances of the killing included "evidence . . . of his intent to rape." Pet. App. 32a-33a. The Commonwealth cannot have it both ways: contending at trial that Powell could be convicted of capital murder in the commission of rape or attempted rape of *Stacie*, and contending now, after that theory of prosecution failed, that a bill of particulars prevented Powell from being placed in jeopardy for that very offense.

Nor can the Warden hide the fact that this case presents the precise question upon which this Court has granted certiorari in *Wood v. Allen*, No. 08-9156. The Warden contends that Powell's claims involve only "legal" and not "factual" issues, but that is demonstrably false. The Warden acknowledges that the state court's determination that Powell suffered no "prejudice" from the false NCIC report was based on "the totality of the evidence." Brief in Opposition ("Opp.") 16 n.6. Because the Fourth Circuit improperly relied on § 2254(e)(1) to evaluate claims based entirely on the state court record, at a

minimum this case should be held – and Powell's execution stayed – pending the Court's decision in *Wood*.[1]

I. VIRGINIA CANNOT NEGATE THE DOUBLE JEOPARDY PRINCIPLES OF *BULLINGTON* AND *RUMSEY* BY CLASSIFYING A PREREQUISITE FOR DEATH AS AN "ELEMENT" OF CAPITAL MURDER.

The Warden seeks to avoid the implications of this Court's holdings in *Bullington v. Missouri*, 451 U.S. 430 (1981), and *Arizona v. Rumsey*, 467 U.S. 203 (1984), based on a semantic distinction: Virginia chooses to classify certain prerequisites for the imposition of death as an *element* (or "gradation offense," Opp. 6 n.1) of capital murder, rather than a penalty phase "aggravator." That distinction does not have constitutional significance, and this issue has been preserved.

1. Tellingly, the Warden first contends that "Powell never presented this argument in the court below," Opp. 17, not that Powell never presented this *claim*. From the moment the Commonwealth reindicted him for capital murder following his initial appeal, Powell has claimed that the Double Jeopardy Clause prevented Virginia from again seeking death. His previous "acquittal of death" – in that the Virginia Supreme Court found that the prosecution had failed to establish *any* qualifying

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[1] The Warden suggests that Powell's "own expert[ ] evaluation" of him was negative. Opp. 1. In fact, the Commonwealth previously has noted the extensive mitigating aspects of that evaluation. JA 906.

prerequisite for the imposition of death – was the foundation for Powell's claim. Indeed, in her argument concerning the bill of particulars, which the Warden concedes Powell *did* raise, Opp. 20, the Warden contends that "Powell goes astray when he speaks of the Virginia statutory framework as 'multiple theories' of capital murder," when instead "each gradation offense committed against a separate victim is a separate capital murder offense." Opp. 24. But that is precisely Powell's point: Virginia *cannot* avoid the double jeopardy principles of *Bullington* and *Rumsey* simply by converting sentencing aggravating factors into substantive "gradation offenses." Pet. 21.

In any event, this Court has made clear that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

2. As Powell has argued, this case is indistinguishable from *Rumsey*. Pet. 18-20. Like Powell, the petitioner in *Rumsey* conceded (through counsel) the presence of a death-qualifying circumstance after his first acquittal. 467 U.S. at 208. This Court nevertheless held that Rumsey could not be subjected to death again for the same crime. Other courts have recognized that the fact that the State charged the *wrong* aggravating factor, or later asserted a *new* aggravating factor, cannot overcome an initial failure to prove any adequate basis for the imposition of death. *Young v. Kemp*, 760 F.2d 1097, 1103-07 (11th Cir. 1985) (regardless of whether the defendant's acquittal of death was

correct, or Georgia could prove a new aggravating factor, defendant could not be put in jeopardy of death again once a court determined that the prosecution's evidence in support of the death penalty was insufficient); *Brown v. State*, 521 So. 2d 110, 112 (Fla. 1988); *State v. Caudill*, 706 P.2d 456, 463 (Idaho 1985); *State v. Lomax*, 774 N.E.2d 249, 254-55 (Ohio 2002) (Cook, J., concurring).

3. To evade these principles, the Warden draws a false distinction between rape as a prerequisite *element* of "capital murder" and the same conduct as a sentencing-phase aggravating factor. Opp. 18-20.[2] Yet such a distinction has been rejected by this Court. In *Ring v. Arizona*, 536 U.S. 584 (2002), this Court held that "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative" on the question of whether a defendant has the right to a jury determination. *Id.* at 605-06 (internal quotation marks omitted). The Warden states that Powell "misunderstands what was at issue in *Ring*," Opp. 19, but then makes no effort to explain why a semantic distinction that was held not to control the application of one fundamental procedural right should be dispositive in the case of another. In other cases, this Court has recognized that the basic purpose of death eligibility factors, and the reason they are constitutionally mandated, is to perform a "narrowing" function to

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[2] The Warden is simply wrong in contending that for a defendant to be acquitted of death, a life sentence must be imposed. Opp. 19. This Court has never held that such a sentence must actually be imposed in order for jeopardy to attach.

"limit the class of murderers to which the death penalty may be applied .... *at either the guilt or penalty phase.*" *Brown v. Sanders*, 546 U.S. 212, 216 (2006) (emphasis added); *Tuilaepa v. California*, 512 U.S. 967, 971-72 (1994); *Lowenfield v. Phelps*, 484 U.S. 231, 244-45 (1988). In none of these cases was the "narrowing" factor's label as an "element" or "sentencing aggravator," or its presence at the guilt or penalty phase, deemed to have any constitutional significance.

The semantic distinction the Warden advocates would convert the adjudication of capital murder into "a set of minitrials on the existence of each aggravating circumstance," precisely what this Court rejected in *Poland v. Arizona*. 476 U.S. 147, 156 (1986). It also would undermine the goal of finality this Court repeatedly has preserved in applying double jeopardy principles to capital sentencing. Finality would become virtually unattainable if prosecutors were able to pursue repeated attempts to obtain death simply by identifying new and distinct "offenses" of capital murder, as the Commonwealth did here.

II. A State Cannot Use A Bill Of Particulars To Define The Scope Of Jeopardy In A Manner Inconsistent With The Double Jeopardy Clause.

The Warden's contention that Powell's bill of particulars argument presents no federal question is patently incorrect. The determinations of the courts below that Powell's re-indictment for capital murder did not violate double jeopardy rests on those courts'

conclusion that the bill of particulars narrowed the scope of jeopardy otherwise defined by Powell's initial amended indictment. But a State cannot define the scope of jeopardy in a manner inconsistent with the federal constitutional guarantee that an individual may not be placed twice in jeopardy for the same offense. The question before the state court was whether a bill of particulars can, consistent with federal double jeopardy law, narrow the jeopardy defined by a broader indictment. Under double jeopardy principles clearly established by this Court, the only reasonable answer to that question was no.

As discussed in the petition, this Court has made clear that jeopardy is defined by the *indictment* and the charged *offense* (or offenses), not by the *facts* alleged (in a bill of particulars or otherwise) or proved at trial. Pet. 23-27. Although states are free to employ bills of particulars, state practices still must conform to federal double jeopardy law. This Court has never recognized an exception to the rule that jeopardy is defined by the *indictment* and the charged *offense* that would allow a bill of particulars or other pretrial disclosure to narrow the scope of jeopardy.[3] As a matter of federal constitutional law, the jeopardy that, once imposed, precludes a second prosecution for the same offense is defined by the *offense* charged in the indictment, not by factual allegations or proof.

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[3] As the Virginia Supreme Court acknowledged, even under Virginia law "the bill of particulars is not for the purpose of charging the offense" and "[t]he indictment must do that." Pet. App. 194a-195a (quotation marks omitted).

Moreover, *even if* there could be a situation where a bill of particulars could be used to narrow the scope of jeopardy from a more broadly written indictment, there must be safeguards to ensure that the federal double jeopardy guarantee is protected. In particular, if ever there were a case where a bill of particulars, rather than a charging document, could define the scope of jeopardy for purposes of the Double Jeopardy Clause, this Court's decisions suggest at a minimum that (a) the theory of prosecution at trial must conform to the narrower scope of jeopardy purportedly defined by the bill of particulars, (b) the narrower scope of jeopardy must be consistent with the definition of the offense provided to the jury, and (c) the prosecution must bear the burden of proving that, despite the broader charging document, jeopardy for purposes of the federal constitutional guarantee was clearly and consistently narrowed by events before and during trial.

The instant case utterly fails any such inquiry. Most egregiously, the prosecution disregarded the bill of particulars and invoked the broader indictment to gain a litigation advantage when Powell moved at trial to dismiss the capital murder charge. Pet. App. 32a-33a. As the Warden admits, not only did the original amended indictment fail to limit jeopardy to capital murder in the commission of a rape of Kristie, but "the Commonwealth mis-worded its amended indictment to include the language 'during' the commission of rape, instead of 'in' the commission of rape." Opp. 9. As a result, the *indictment* on which Powell was tried was "restricted to crimes of murder occurring during or after the

rape." *Id.* Moreover, the Warden concedes that "it was uncontested that Powell murdered Stacie before he raped Kristie" and, therefore, "the murder could not have occurred 'during' the commission of rape." *Id.* Thus, the Warden now concedes that Powell's motion for directed verdict should have been granted, *and no prerequisite for death would have been proved at Powell's first trial.* But at trial, the Commonwealth mightily resisted that result (and indeed, now, the Warden *relies* on the fact that "Powell never was 'acquitted of death'" at that trial, Opp. 18). And the Commonwealth resisted that result the only way it could: by arguing there was evidence of murder in the commission of a rape or attempted rape of *Stacie*, which the charging document was broad enough to encompass. This tactic was compounded by other prosecution conduct at trial. *See* Pet. 5-6. The Warden cannot be permitted now to claim that jeopardy was defined by the narrower offense specified in the bill of particulars when Virginia so blatantly ignored that limitation throughout the trial. It is telling that, in its second opinion, the Virginia Supreme Court dismissed the significance of Powell's indictment as the product of "a drafting error." Pet. App. 196a.

As Judge Gregory noted, the Commonwealth "did not fail to prosecute Powell for the attempted rape of Stacey, it just failed to do so successfully." Pet. App. 33a n.1. The double jeopardy issue here is important and worthy of this Court's review.

III. THE ISSUE IN *WOOD* IS SQUARELY PRESENTED.

The Warden's contention that Powell's case does not present the issue in *Wood v. Allen*, No. 08-9156, is untenable.

1. Powell asserts that the state court made unreasonable determinations of the facts concerning the errors in the NCIC report and assumptions the jury may have made regarding those errors. The report contains *two* false *convictions* for capital murder and a *third* entry for capital murder "disposition not received." Pet. App. 160a, 161a. A lawyer familiar with this case cannot recognize these errors by looking at the document, *see* Pet. App. 158a-162a, much less a lay jury. The document also contains ten other entries Powell has shown should not have been presented to the jury because they were prejudicial (dismissed and nolle prossed charges). JA 15 nn.7-9.

For the first time, the Warden describes the capital murder conviction at the top of page 3, Pet. App. 160a, as "accurate[ ]." Opp. 12. This is absurd – at the time of Powell's retrial he had *no* convictions for capital murder, and a conviction that is reversed is patently no longer a conviction. And the Warden, like the state court, makes a vital mistake in speculating that the jurors must have deduced this entry was for Powell's overturned capital murder conviction. The Warden and the state court have ignored the entry for capital murder at the bottom of page four, App. 161a, "disposition not received." If the jury were to speculate that *any* entry on the report were to relate to the killing of Stacie, it would

be this entry, not the two capital murder *convictions* also claimed on the report.

The Warden, like the state court, also wrongly states that "little to no use" was made of the report at trial. Opp. 30. To the contrary, the NCIC report was the only *evidence* of Powell's criminal history. The jury was instructed to consider Powell's criminal history, JA 298, and it certified it had done so on the verdict form. Although the Warden and courts below place great weight on the fact that the prosecutor, in a statement to the court in the presence of the jury, accurately listed Powell's prior crimes, Opp. 30, the jury was instructed that statements of counsel are not evidence, and this Court has emphasized that a jury is presumed to follow such instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

The Warden also has no explanation for what the jurors must have thought about the second capital murder conviction on the bottom of page 3, Pet. App. 160a. The opposition resorts to a meaningless explanation for how the NCIC report may have contained such an error, Opp. 13 n.5, but the jury had none of that information.

Thus, the state court unreasonably found that the NCIC report contained only *one* false conviction for capital murder and then unreasonably speculated that the jury must have known that Powell had *no* prior convictions for capital murder. App. 166a. Powell always has emphasized that the issue is *not*, as the Warden contends, whether the jury still would have found the aggravating factors of future dangerousness and vileness. JA 799; *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998) (explaining difference between eligibility for death and selection

of death over life in Virginia scheme). The issue is whether, despite these aggravators, the jury would have imposed death, particularly given that Virginia does not require the jury to "weigh" the aggravating factors against the mitigation evidence. Pet. App. 164a-165a. Clearly, a correct assessment of the false prior convictions in the NCIC report is necessary to determine whether confidence in the jury's selection of death over life without parole was undermined by those errors.

2. The Warden's insistence that the state court's rejection of Powell's ineffectiveness claim was based on an evaluation of *prejudice* further highlights the factual nature of this claim. Opp. 30-31. The issue of prejudice inherently includes factual determinations and an assessment of the record. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). The Warden admits as much, arguing that the Virginia Supreme Court "found that the dissenting opinion failed to take into consideration the totality of the evidence to be weighed in determining the issue of prejudice." Opp. 16 n.6. Thus, Powell's ineffectiveness claim indisputably challenges the state court's determination of the facts in light of the state court record, to which the Fourth Circuit improperly deferred.

3. Finally, the state court's rejection of Powell's double jeopardy claim also was based on factual determinations. As Powell has shown, Pet. 33-34, his double jeopardy claim was rejected based on a factual determination of what occurred at his first trial. As Judge Gregory concluded, "[i]n finding that the attempted rape of Stacey had not been litigated in the first trial, the Supreme Court of Virginia made

an unreasonable determination of the facts in light of the conduct of all parties involved in that trial." Pet. App. 40a.

Thus, with regard to both the NCIC report and double jeopardy claims, Powell challenges the state court's factual determinations based on the contents of the state court record. His claims therefore arise under § 2254(d)(2). Yet the Fourth Circuit applied § 2254(e)(1) to these claims, consistent with its earlier decision in *Lenz v. Washington*, 444 F.3d 295, 300-01 (4th Cir. 2006). Pet. 31-33. The Warden in fact acknowledges the Fourth Circuit's application of § 2254(e)(1). Opp. 31. What the Warden fails to grasp is that this is precisely the reason this case raises the same question as in *Wood*. Like *Wood*, Powell's case raises the question whether the § 2254(e)(1) standard applies to federal habeas challenges based solely on the contents of the state court record. Thus, at a minimum, this Court should hold Powell's petition pending its resolution of *Wood*.

CONCLUSION

The petition should be granted and Powell's execution stayed.

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